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DECISIONS

OF THE

COURT OF SESSION.

From November 1807 *to November* 1808.

COLLECTED BY

J. H. MACKENZIE AND J. WEDDERBURN, ESQUIRES,

ADVOCATES.

BY APPOINTMENT OF THE FACULTY OF ADVOCATES.

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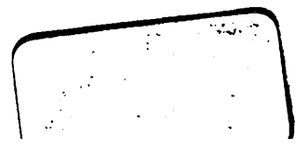
INDEX.

PURSUERS NAMES.

	No.
A	
Aberdeen, Magistrates of	54
Aitkinson, Mure, and Bogle	23
B	
Balleny, William, trustee on the estate of George Robb	49
Balfour, James	50
Blackadder, Robert, and others	60
Broadford, John	1
Brown, Robert, and others	43
Brown and Co.	13
Burns, Thomas, petitioner	10
C	
Campbell, James	35
Canongate, Hammermen of	16
Cathcart's, Sir Andrew, Trustee	9
Charity, Mrs, and others	65
Constable, Arch. and Co.	45
Craig, Alex. deacon, John Armour, sen. collector of the Corporation of Tailors of Glasgow	26
Craigie, Robert and James Horne, trustees of Sir James Norcliffe Innes Ker	24
Crawford, William and John	16
D	
Dawson, Robert	53
Denniston, M'Nayr and Co.	31
Dundas, James, trustee on the sequestrated estate of Richmond and Freebairn	47
Dundee, Incorporation of Fleshers of	33
E	
Ewing, James, trustee on the sequestrated estate of Bryson	38
Ewing, Robert, acting partner of the Lanark Twist Co.	46
F	
Forbes, William, Esq. of Callender	27
Forfar, Magistrates of, and Alexander Malcolm	39
Ford	41
Forrester, Michael	17
Forrester, John	32
Fraser, Charles, trust-disponee of Robinson and Co.	8
Fraser, Simon, Esq. Sheriff of Inverness-shire	67
G	
Glassford, Misses	37
Grieve, Adam	12
Guthrie, Mathew, and others	15
H	
Haddington, Bakers of	51
Hutchison, Rev. Dr Alexander	40
I	
Irving, William	48
K	
Ker, Sir James Norcliffe Innes, and Brigadier-General Walter Ker, and Richard Hotchkis, W. S. his attorney	22
Kinloch, Sir Alexander	34
L	
Lamont, Alexander, Trustee on the sequestrated estate of Lambert and Co.	55
Lindsay, Children and Grandchildren of David	14
M	
M'Lure, Jean and others	7
Mackay, John, Alexander Munro, and others	11
Malcolm, Sir John, of Balbedie	5
Martin, William	58
Maxwell, Alexander Welsh	56
Maxwell, Isabella	36
Millar, Andrew, schoolmaster in the parish of Cambuslang	68
Moodie, of Milsetter, Major James	59
Morison, James	62
P	
Paterson, James and David	64
Perth, Bakers of	66
Prestonkirk, Minister of, and the Procurator for the Church of Scotland	28
Pringle, &c. Messrs John, Principal Clerks of Session	29
Pringle, John, &c, Principal Clerks of Session	30

L.L.
Gw. U.K.
Scott. 100.
F10.



" and ordained all execution necessary to pass and be directed hereon a-
" gainst the said John Broadford, for payment of the said penalty; and
" grant warrant to messengers at arms, and constables of the county of
" Forfar, to poind and distrenzie the said John Broadford's readiest goods
" and chattels for payment of the said fine, with the expence of such
" distress and poinding. Extracted upon this, and the preceding page,
" by," &c.

On this extracted decree a poinding was attempted, 10th April.

Broadford presented a bill of suspension. This bill was refused, 7th July. He then reclaimed.

Argument for Suspender.

It is admitted that the Justices of Peace have a final jurisdiction in excise questions, and that their decrees in such questions cannot be reviewed for *iniquity*. But their decrees may be reviewed for *irregularity*. Pattulo against Maxwell, 25th June 1779;—Cunninghams and Simpson against Hume, 19th January 1796. Now here is a gross irregularity in the want of a proper record.

The record produced does not specify either the nature, time, nor place of the offence for which the suspender was condemned. It only says, that spirits were seized from him, which might happen without any blame whatever on his part, and is no sufficient ground for a sentence of fine. Then, if it were an offence punishable by fine, yet without specification of the time, it does not appear that it was not committed beyond the time allowed by statute 31st Elizabeth, for bringing such a prosecution, nor without specification of the place, that it was locally within the jurisdiction of the Justices. If records of this kind are to be held sufficient, it is impossible for the Supreme Court to exercise any controul over those inferior courts which possess final but limited jurisdiction. But it is the right and the duty of the Supreme Court to exercise controul over these courts for two purposes. 1*st*, To prevent them from exceeding their powers. 2*dly*, To prevent them from neglecting proper form. It is, therefore, necessary, that their record shall show whether they have done either of these things, and where it fails in these particulars; this, of itself, is a most important want of form, which renders the procedure liable to the review and correction of the Supreme Court.

Argument for the Charger*.

The proceedings in this case were, in fact, perfectly regular. The information charged an offence undoubtedly relevant, and which it was competent for Justices to try. A proof of this offence was taken in due form, and on that proof a sentence was given. There was, therefore, no irregularity in the proceedings. As to the record, it never was the practice of Justice of Peace courts to keep a regular record. All that they have

* This was stated at the Bar, the petition not having been seen.

have ever been accustomed to do, is to write down their sentence, with such a minute of, or reference to the procedure, as renders it intelligible. This accordingly has been done here, so that neither is there any irregularity in the record.

The Court (Nov. 14. 1807) thought the record sufficiently full and formal for a Justice of Peace Court; and on the assumption that the proceedings had been regular, which was not denied, "Refused the "petition."

Lord Ordinary, *Armadale.* Act. *Gilb. Hutcheson.* Agent, *J. and T. Peat.*
Alt. *Solicitor-General.*

M. W.

No. II. *November* 17. 1807.

JANET WIGHTMAN

AGAINST

JOHN TOMLINSON.

PROOF.—*Semiplena probatio, that a man is father of bastard child—What?*

JANET WIGHTMAN brought an action before the Commissary of Glasgow, against John Tomlinson, for aliment of her bastard child. In defence, he denied being the father of it. She craved that he might be judicially examined, which was done, and his declaration was in these words:—"That the pursuer, in November 1803, was servant with Dr "Rankin in the town of Douglas: That before this time the declarant "may have seen or spoke to her in the said town of Douglas: That in the "month of October 1803 he thinks he was first in company with the pur-"suer, and no other person was then present: That this happened about "one o'clock in the morning, when the declarant called on the pursuer at "the house of her said master Dr Rankin: That the declarant and the pur-"suer remained together for about an hour and a half: That the last "time he was in company with the pursuer was on the 2d of November "1803, in the house of the said Mr Rankin in Douglas: That he is sure "of this date, as he recollects it was nine days before Martinmas term "1803, and he was never afterwards in company with the pursu-"er by herself alone. But in the month of August last the pursuer and "her mother came to the declarant's house in Douglas, and the pursuer "then accused the declarant of being the father of the child with which "she was then pregnant; and the declarant said to her, that if the child "came to his time he would acknowledge himself as father; and he

"meant

" meant by his time, that the birth should correspond with the foresaid " 2d November, or the dates of his visits to the pursuer on the previ- " ous month of October. And being shewn a letter, dated 14th Novem- " ber last, signed John Tomlinson, and addressed to the Reverend Mr " M'Cubbin, Douglas,—declares, That the subscription to the said letter " is the declarant's hand-writing."

The letter referred to, and which had been written by the defender previous to his being cited in the action, was as follows:— " 14th Nov. 1804. Sir, Your letter to my father of this date I have " seen, and agreeably thereto do *confess being guilty* with Janet Wight- " man, *but I am by no means the father of her child.*"

On this declaration and letter the pursuer craved that she might give her oath in supplement. The Commissary allowed the pursuer the benefit of her oath in supplement.

The cause having come before the Court of Session by advocation, the interlocutor of the Lord Ordinary was, (Nov. 12. 1806)—" In respect it " appears that the judicial declaration of the defender, and his letter to the " Rev. Mr M'Cubbin, of date 14th Nov. 1804, which the pursuer has stat- " ed to be all the proof she has to adduce, afford no evidence that the de- " fender is the father of the pursuer's child; finds that the pursuer is not " entitled to be admitted to the benefit of her own oath, which, although " it might be received to supply an imperfect proof, cannot be admitted " to the effect of contradicting the only evidence which has been " brought in this cause; therefore remits to the Commissary of Glasgow " with instructions to recal the interlocutors complained of, and to as- " soilzie the defender."

The pursuer reclaimed. On advising the petition and answers, the Court (March 7. 1807) refused the petition, and adhered to the interlocutor of the Lord Ordinary.

The pursuer presented a second petition, on advising which with answers, the Court, (July 1807) by a majority, " altered the interlocu- " tors reclaimed against, and remitted to the Lord Ordinary, with an " instruction to allow the pursuer to give her oath in supplement, and " thereafter to proceed farther in the cause as to his Lordship shall seem " proper."

The defender reclaimed.

But the Court, (Nov 17. 1807) chiefly moved by his letter, which, it was observed, contained no limitation of time, refused his petition, without answers.

Lord Ordinary, *Robertson.* Act. *John Cunningham.* *James Hamilton*, W. S. Agent. *P.* Clerk.

M. W.

WILLIAM

No. III. *November* 17. 1807.

WILLIAM DUKE OF QUEENSBERRY

AGAINST

FRANCIS EARL OF WEMYSS, and Others.

TAILZIE.—It was provided, that it should not be lawful to the heirs of entail to "*sell, alienate, wadset, or dispone the lands, &c.*" and afterwards that, "*notwithstanding the irritant and resolutive clauses,*" it shall be lawful "*to the heirs of tailzie to set tacks of the said lands "and estate during their own lifetime, or of the lifetime of the re- "ceivers thereof, the same being always set without evident diminu- "tion of the rental.*" Under these clauses, a lease for ninety-seven years, and for which a grassum was paid, although without diminution of the rental, was found to be unlawful.

BY a contract of marriage between Lord William Douglas, second son of the Duke of Queensberry, and Lady Jane Hay, second daughter of the Earl of Tweeddale, the said Lord William Douglas and Duke of Queensberry, on the 12th October 1693, resigned the lands and barony of Neidpath for new infeftment, under all the fetters of a strict entail.

Inter alia it was provided, "That it shall be nowise leisome or law- "ful to the said Lord William Douglas, and the heirs-male of his body, "nor to the other heirs of tailzie respective above mentioned, nor any "of them, to sell, alienate, wadset, or dispone any of the said haill lands, "or any part thereof, nor to grant infeftment of liferent, nor annualrents "forth of the same, nor to contract debts, or do any other fact or deed "whatever, whereby the said lands and estate, or any part thereof, may "be adjudged, apprised, or otherwise evicted from them or any of them, "nor by any other manner of way whatsoever, to alter or infringe the "order and course of succession abovementioned." The deed likewise contained the following clause. "It is likewise hereby expressly pro- "vided and declared, That, notwithstanding of the irritant and resolu- "tive clauses above mentioned, it shall be lawful and competent to the "heirs of tailzie above specified and their foresaids, after the death of the "said William Duke of Queensberry, to set tacks of the said lands and "estate during their own lifetime, or of the lifetime of the receivers "thereof, the same being always set without evident diminution of the "rental."

This entail was admitted to be valid and effectual, and to possess all the requisites of the act 1685. And at its date a rental of the estate was made up and signed by the parties.

William, the present Duke of Queensberry, the pursuer, succeeded to his father, in the year 1731, under this entail. On the 17th January and 11th April 1801, his Grace granted a lease of certain parts of this barony to Alexander Welch for 57 years from the preceding Whitsunday, at the rent of L.86. 15s. 2d. Sterling, and at the same time received a grassum of L.301 Sterling. On the 23d November 1802, Alexander Welch renounced this tack, and received from his Grace a new one for the space of 97 years at the same rent, for which he paid a grassum of L.318. 1s. 2d. Sterling. This lease was not let to the diminution of the rental.

Certain doubts having occurred with respect to the validity of this lease, the Duke of Queensberry raised a declaratory action, concluding that he had a right to grant these leases.

The Earl of Wemyss, and others next heirs, appeared, and contended, that these leases were granted in contravention of the entail, and therefore not effectual.

The cause was debated before Lord Glenlee, Ordinary, by whom it was reported to the Court. Counsel were heard in presence.

Argument for the Pursuer.

1. As to the principle of interpretation applicable to entails.

From the earliest writers on the law of Scotland it appears, that entails were introduced with difficulty, and interpreted with rigour, and that the anxiety of a powerful aristocracy to perpetuate their names and families, was opposed by the opinions of lawyers who discerned the legal difficulties, and the public inexpedience of putting the property of land under such restrictions as could alone accomplish this object. Craig, p. 329 and 340. Edit. Baillie.

The first entails seem to have been conceived in the form of a mutual contract, but the mode afterwards adopted was that of interdicting the heir from doing those deeds which the entailer wished to prevent. Hence they received the same strict interpretation as a public interdiction. Spottiswoode Pract. p. 331 and 332. In the case of Stormont, in which the effect of these prohibitions, improved and strengthened by the addition of irritant and resolutive clauses, was first discussed, the Court had great difficulty in supporting them. Stair, edit. 1681, p. 271.

To remove these legal difficulties the act 1685, c. 22, was passed; but although it legalized the constitution of entails against third parties, yet the same principles which opposed the introduction, continued to dictate a strict interpretation of them. Stair, edit. 1681, p. 272. edit. 1693, p. 228.

At an earlier period (13th Ed. I.) the English aristocracy made the same attempt, and entails were introduced in England with the benefit of a more liberal interpretation. But to reconcile them to the principles of law, a fiction was adopted, that the fee of the estate was not completely vested in the heir. Blackst. vol. ii. p. 112.

In the law of Scotland, however, such a fiction was not resorted to; the fee is held to be in the heir, and the prohibitory clauses are not considered

sidered in the favourable view of deeds of intention, but as perpetual interdictions with respect to the estate. Every act, therefore, which is not specially forbidden, the heir is at liberty to do. In the opinion of all institutional writers, entails are so considered. M'Kenzie, b. 3. tit. 8. § 17. Spottiswoode's and Bayne's edit. p. 232, note A. Bank. b. 2. tit. 3. § 149 and 150. Ersk. b. 3. tit. 8. § 12. By a numerous train of decisions the same principles of interpretation have been established, 24th November 1769, Edmonstone of Duntreathe;—8th July 1789, Stewart against Home;—15th January 1799, Bruce of Tillicoultry. It is therefore now settled law, 1*st*, That the heir of entail is considered unlimited proprietor of the estate, unless in so far as he is fettered by the prohibitions of the entail. 2*dly*, That these prohibitions are construed in the most rigorous manner. And, 3*dly*, That their meaning cannot be extended by implication from other clauses of the entail.

2. As to the meaning of the clause founded on.

Even if leases could be considered in law to be alienations, the prohibition that the heir shall *not sell, alienate, wadset, nor dispone*, does not contain a prohibition to grant leases. In legal language these terms characterise a sale or conveyance of the estate. They are terms appropriated to express a total divestiture of the property, an act altogether different from that of granting a lease. In granting a lease, the proprietor *sets, and in tack and assedation lets*; but the terms here used are those adopted exclusively in granting a feu or wadset, in accomplishing an excambion or a sale. As they are classed in the present case, they denominate a sale; and by a noted decision (Stewart against Hoome, *supra*) they have been found incapable of a more extensive interpretation. By that decision it was determined that the word *dispone* could not be separated and applied to a gratuitous conveyance. On the same principle, the word *alienate* cannot be separated from the rest of the clause, and applied to the transactions in question. If, in the view of the Legislature, the term *alienate* could apply in general to any mode by which the property could be taken from the heirs, there would not have been any necessity for specially prohibiting gratuitous and onerous conveyances, and contraction of debts, which the statute and the decisions of the Court have required to be specially prohibited. If the term alienate cannot reach a lease, it is equally certain that the clauses against *creditors*, *adjudgers*, and singular successors, are also ineffectual for this purpose. Ersk. b. 2. tit. 7. § 1.

If leases had been considered as alienations, they would have been the subject of a special prohibition in the statute; and that tenants were known in law, is clear from the next act in the statute book 1685, ch. 24. That leases are of a nature distinct from any of the deeds enumerated in the statute is further proved from the cotemporary styles in which leases are the subject of a separate prohibition. Dallas, p. 552, 553. and 587.

3. Supposing the words of the clause could be taken alternatively, yet a long lease is not in law an alienation. Neither in technical nor in common language, is a lease an alienation. It is a personal contract; and whether it be of a long or a short endurance, from its nature it is pre-

supposed, and necessarily implied, that the granter of it, as well as the subsequent heirs, still continue feudal proprietors. In fact the present heirs have a greater rent after this alleged alienation, than the prior heirs had before its date. There is not an authority in law which, when fairly considered, characterises a lease as an alienation. Craig, b. 3. d. 4. § 5. and b. 2. d. 10. § 5. whose knowledge of the law of Scotland was circumscribed and warped by feudal notions, does not explicitly term a long lease an alienation, but merely states the opinion of foreign feudists.

In the last edition of Stair, long location is stated to be an alienation; but this has been inserted by an error of the editors, without the authority of any *MSS.*; and the passage is obviously copied from Craig. In the edition 1693, published in his lifetime, a contrary opinion is stated, b. 2. tit. 11. § 13.; b. 1. tit. 15. § 1.; b. 2. tit. 9. § 2.; and the edition of 1681 contains the same opinion.

M'Kenzie, on the act 1621, p. 8. and p. 33, states explicitly, that tacks could not be comprehended as alienations under *the letter of the law*, but that the statute reached them from the favourable interpretation given to laws for the prevention of fraud. But the principle of construction applied to entails is of an opposite nature; and as leases are not comprehended under the letter of this entail, this authority is favourable to the pursuer: From the observations of the same author, on the 11th James II. c. 41. it is clear that alienation, in its fair and legal acceptation, did not include leases.

Balfour, c. 15, 17, 18, *voce* Assedation, refers merely to the powers of churchmen to grant leases of their benefices beyond their own lifetime, and affords no authority on the point.

Neither does the style of an inhibition, as given by Stair p. 762, sanction the idea that tacks would be struck at by this diligence as alienations. Leases are there specially enumerated, and would not otherwise be held included.

That a person on death-bed cannot grant a lease beyond the ordinary term of administration, affords no authority on this question. A person in that situation cannot exercise any act of property beyond the compass of ordinary administration. Stair, b. i. tit. 20. § 38.—Kilk. *voce* Death-bed, No. 7. It is altogether a mistake, too, to allege that this part of the law originated in a statute of William against alienations. Stair, b. iii. tit. 4. § 27. But at any rate, by settled principles of construction, an heir of entail is in a totally different situation, with respect to power, from that of a person on death-bed; and is entitled to do every thing from which he is not specially prohibited.

Dallas, p. 648 and 650, was of opinion that a lease for a thousand years was not in law an alienation.

From a minute examination of every authority in law, it appears that a lease is not in its own nature an alienation; and indeed the defenders, while they acknowledge that a lease of a short endurance is not such, merely contend that the one at present in dispute does, from the extent of its endurance, amount to an alienation. But it is clear, that in a lease for 97 years, the granter is as much proprietor as in a lease for 5, and he possesses in both cases the same privileges of enjoyment. There

is not to be found in books of law any criterion of endurance to determine when a lease changes its nature and becomes an alienation, and a legal act of a totally different character. It is plain that law neither can nor ought to afford any such criterion. The length of leases must necessarily fluctuate with the fluctuating opinions of mankind on agricultural affairs. Where the subject does not admit of definition, there can be no limit. Where the entailer himself has dictated no limit, the Court cannot exercise a discretionary controul, without overturning those principles of interpretation in the law of entails which require the fetters to be clear, explicit, and definite, and without introducing into the law the most dangerous uncertainty. Cuningham, Law Dict. *voce* Wills, Vol. II. No. 137.

4. The general point involved in this case has already been decided, 2d March 1779, Leslie against Orme, Supp. to Dict. p. 184, and Fac. Coll.—wherein a lease for 76 years, granted by an heir of entail, was supported, and this decision has, in the understanding of the country, been regarded as fixing the point, that in the absence of special prohibition any lease under 100 years may validly be granted.

It appears likewise from 10th Geo. III. c. 51, that the ideas of the legislature coincided with the principles of the Courts of law. For by that statute, heirs prohibited by entails to let leases beyond a certain endurance, are enabled, in certain circumstances, to grant leases of 38 or 100 years. The narrative of this act therefore proves, that it required an express prohibition to prevent heirs from letting leases of such an endurance.

5. By permitting liferent leases the entailer sanctions leases of every other kind. Liferent leases are the highest species of lease known in law, and the permission of these must include all of an inferior description. Accordingly, liferent leases, being a higher kind of property, are subject to liferent escheat, while those of a definite endurance fall under the single escheat, 1617, c. 15. In the opinion of Lawyers, the only leases which, in point of duration, can be assimilated to liferent leases, are those for 100 years, which is the legal term of life. M'Kenzie's Observations, p. 379. A liferent lease also may be assigned like those of a long endurance, and on the same principles. Bank. b. ii. tit. 9. §. 46. Stair, b. ii. tit. 9. § 26.

Such likewise is the principle of the English law, where a lease of a definite endurance is of less value than that of a lifetime. Bac. abridg. *voce* Lease.

In maintaining that the permission to grant a liferent lease amounts to a prohibition to grant those of any other description, the defenders attempt to create a limitation by inference which is contrary to the established principles of law. But if implication is to be at all permitted, the correct conclusion is, that it is a prohibition to grant a longer lease than what is equivalent to a lifetime, which, in law, is a hundred years. It is sufficient, however, for the pursuer to say, that this clause can have no legal effect from its defective expression. Every instance of a disappointed

entail is an example of clauses defective in precision meeting with the same fate.

Argument of the defender.

1. As to the principle of interpretation.

That an heir of entail may do every thing which he is not expressly prohibited to do, and that the prohibition of one thing does not infer the prohibition of another, merely because their consequences to the substitutes of entail may be the same, is admitted. Thus a prohibition to sell does not include a prohibition to contract debt. Nor is either included in a prohibition to alter the course of succession. Neither are prohibitions against the substitutes effectual against the institute without express provision. But then these acts are substantially different, although one of the ultimate effects of either may be to disappoint the succession; and it is a probable or possible supposition, that the entailer might prohibit any one without meaning to prohibit the rest, or might desire to direct the prohibitions against the remoter heirs without wishing to include the person whom he first called. It must also be observed, that although the Court, by the adoption of a strict interpretation, have established these points, it may now be asserted that the principle of strict interpretation has been carried as far as can safely be permitted, and would not be applied to new cases, which, though analogous, do not precisely correspond with those already determined. Even if the present, therefore, had a slight analogy with any of those modes of defeating entails which the law will not interfere to prevent, it would merit consideration whether the principle of strict interpretation would be applied to it, while entails are recognised in law. But this is a point which the defenders have no interest to dispute, for they do not plead that the leases complained of are like or equivalent to alienations, but that they are really in contemplation of law alienations.

2. As to the import of the prohibitory clause.

The stat. 1685 did not introduce entails, nor prescribe any particular and technical form in which they should be conceived. It was passed to remove certain legal scruples, which the case of Stormont had excited. It had an obvious and general reference to those modes of guarding against the defeat of an entail which were at that time in use. Indeed the various devices by which entails may be defeated are almost infinite; and a specific enumeration is beyond the power of the most acute conveyancer, or the most prospective legislature. In the statute, therefore, those generic terms were used which in law bore a distinct reference to certain classes and descriptions of deeds; and in expounding these terms the defenders do not plead that they should be extended beyond their proper meaning, but that they should have that generic effect which was attributed to them by those by whom they were used. That the clauses in the entail do not fall short of those in the statute, is admitted. It is declared, that the heirs shall *not sell, alienate, wadset, nor dispone.* In maintaining that these terms in law and practice characterise nothing but a sale, the pursuer overlooks that they are connected by the *disjunctive* particle *nor*, and not by the conjunctive *and*. If they had stood connected by the conjunctive

conjunctive particle, there might have been some force in the argument; and it might have been said, that the meaning of the generic term *alienate* was restricted by those *sell* and *dispone*; but from their being grammatically connected by the disjunctive particle, each of the three terms denote a distinct meaning. The term *alienate*, therefore, may be separated, and conveys a distinct meaning. It has a generic meaning, and applies to every transaction of which the effect is to give to another the substantial interest in the thing alienated. That it is not restricted to total and absolute divestiture of property is clear; because, on the one hand, there may be an effectual alienation, without any direct transference of the property,—and on the other, there may be a nominal transference of the property where there is no alienation. Of the one, a lease for an illusory rent, and for a thousand years, or the grant of a servitude of pasturage over a whole estate, are instances; of the other, the creation of a freehold, and the conveyance of the superiority. Neither is it necessary that the alienation be perpetual, for the conveyance of an entailed estate for a given period to a stranger would not be effectual against the succeeding heirs. The criterion of alienation therefore is to be discovered from the substance, and not from the style of the transaction. In deciding this question, the circumstances of the particular case must be examined, and the same species of transaction may in one circumstance be termed an alienation, and in another an act of ordinary administration. That a lease is not an alienation in its own nature, and when granted as an act of ordinary administration, yet that it may be granted in circumstances (for an immoderate endurance, and for an illusory rent) which convert it into an alienation, cannot be denied.

The middle point then, when a lease ceases to be an act of ordinary administration, must be ascertained; and no doubt this is difficult, from the fluctuations in the opinion and practice of mankind at different times. To solve this difficulty usage must be resorted to; and it must be enquired whether, at the date of the entail, leases like those in question would have been regarded as alienations, and would have been obnoxious to the prohibitions therein contained. In the law and practice of Scotland there has always been a marked distinction between long leases and those of ordinary duration; and although the period of long and ordinary leases bear a distinct reference to the prevailing system of management of the day, and must therefore fluctuate, yet the distinction has never been overlooked. While the latter have been sustained, the former have been invariably characterised as alienations.

Thus long tacks of the property annexed to the Crown are prohibited as alienations,—M'Kenzie's Observations on Stat. 1455, c. 41.;—and after the act of annexation in 1745, wherein alienations of the annexed property were prohibited, it was thought necessary to invest the Commissioners with special power to grant leases of a definite endurance.

Analogous to these limitations on the Crown, are those on churchmen in the management of their benefices. It appears that they were not permitted to let leases for more than a few years; and a liferent lease was accounted beyond the term required for ordinary management, and therefore prohibited as an alienation.—Balf. Pract. p. 203. c. 17.

In

In a chapter of the treatise *de Feudis*, b. ii. d. 10. § 5. devoted to the subject of leases, and professedly on Scotch law, the author explicitly distinguishes between long and ordinary leases, and characterises the former as alienations. In another passage the same distinction is pointed out.—B. iii. d. 4. § 5. In the passage quoted by the pursuer, L. iii. d. 3. § 23 & 24. the author is no doubt chiefly occupied in reconciling an inconsistency in the foreign feudal law, but he at the same time obviously refers to the principles of the Scotch law.

In the opinion of Stair likewise long location is alienation,—B. ii. tit. 11. § 13. edit. 1759, which is the most correct of the three editions,—and there is no ground for presuming that this is an interpolation. In B. ii. tit. 11. § 13. edition 1693, quoted by the pursuer, the author is occupied with reconciling an inconsistency in the feudal customs of Italian states, and discusses the point noticed by Craig, and he merely says, that in the feudal law of the Italian states long location was not alienation. In B. i. tit. 15. § 1. edit. 1693, he says that *tacks* in the *ordinary intent thereof* are not alienations. But the lease now debated is an enormous violation of the ordinary intent of that species of transaction, and, *ex converso* of the author's principle, must be considered to be an alienation.

In other branches of the law long leases are considered to be alienations. By the law of deathbed, into the origin of which it is unnecessary to enquire, a long lease is struck at as an alienation.—Dict. vol. i. p. 215. Fac. Col. 19th June 1759. Bogle.

By the authority of M'Kenzie, Observ. on Stat. 1621, c. 18. against fraudful alienations to the prejudice of creditors, tacks are comprehended under alienations. And although this may have arisen from a liberal interpretation of the act, it is nevertheless evidence that, in the acceptation of law, a species of transaction, which in form is a location, may in reality be classed with alienations.

In like manner, in giving effect to the diligence of inhibition, it is beyond doubt that leases like those debated would be reduced on the ground of an alienation, without a special enumeration. In the style given by Stair, the alienation of tacks, and not the granting of them, is specially prohibited, and therefore the granting of them could only be reached under the general head of alienations.

Law makes another marked distinction between long and ordinary leases. Of long and liferent leases, assignations may be granted without special power. In tacks of ordinary endurance, special power to assign is required, the former being a higher species of property than the latter, Bank. b. 2. tit. 9. § 46.

By the law of England a lease is classed with the modes of alienation. Black. b. 2. ch. 28.

Tailzies effectual against third parties are merely the creatures of the statute; and if the statute does not from its terms enable an entailer to prohibit long leases, it follows, that any prohibition in the entail against them, however explicit and fortified with irritant and resolutive clauses, would be ineffectual against the tenant. The terms of the entail are coextensive with those of the statute; if, therefore, long leases are not struck at by the prohibitions against alienations, it must follow that the statute is in a most important particular deficient. Nay, unless long leases are

are included under this term, there is nothing to prevent heirs to let effectual leases even to the diminution of the rental. For if leases are not included under the term alienation, or are a mode of alienation not prohibited by the statute, any regulations dictated in the entail, with regard to them, would be quite ineffectual.

But that this is not the interpretation of the statute, is clear from the terms of all cotemporary entails, and from the decisions of the Court. Of the entails executed at the date of the act, as well as subsequently, many contain provisions with respect to the duration of leases, and these provisions have been sustained by the Court.

Of the cases which appear among the reports, none sanction the doctrine of the pursuer. On the 26th November 1761, Kinnaird against Hunter, a lease for 25 years was sustained, on the express ground that the entail was not recorded, and the expression of this *ratio decidendi* in the interlocutor warrants the conclusion, that in other circumstances it would not have been sustained. On the same principle, as appears from the appeal cases, was decided the case 22d February 1774, Carre against Cairns.

The case of Leslie against Orme, on which the pursuer so much relies, was full of specialties. 1*st*, The leases seem to have been granted for money advanced for the purpose of recovering the estate for the heirs, of which the pursuer was one, and therefore he might be barred *personali exceptione*. 2*d*, There was a very extensive permission to grant leases, even to the diminution of the rental. 3*d*, The heir of entail, by whom the process was raised, had ratified the lease; and it does not appear how far this ratification was not binding on his son, by whom the process after his death was pursued to decree.

2. The clause which, notwithstanding the preceding general prohibitions, declares it to be lawful to let leases for the lifetime of the granter and receiver, is a distinct and express prohibition of leases of any other description. If heirs of entail had liberty to grant leases of unlimited endurance, notwithstanding the prohibition of alienations, the permission here contained would have been both useless and absurd.

It is a settled rule, however, in the construction of all deeds, that no clause shall be construed in such a manner as to render it useless, if it can bear any other construction; and further, that no clause in a deed shall be construed to import an absurdity if it can bear a reasonable meaning.

When a person having power to grant or deny, to permit or prohibit, any thing, does grant liberty to a defined extent, the conclusion is irresistible, that beyond the assigned limit the power does not extend. Lawful and unlawful, competent and incompetent, are co-relative terms, and a declaration that it shall be lawful to grant tacks for a certain term, necessarily and directly imports, by the unaided force of the language, that it is unlawful to grant them for a longer term.

If a different construction be put on this clause, it must follow that the heir may grant leases not only for what endurance, but for what rent he may think fit. For the restriction, *without diminution of the rental*, applies only to those leases which the heir is specially permitted to grant. It is only, therefore, a liferent lease that must be granted without diminution of the rental. This clause, then, must be understood taxatively,

and as pointing out those leases which alone the heir was entitled to grant.

While the Court were unanimous in sustaining the defences in this question, they were equally unanimous in supporting all those decisions by which the principle of applying strict interpretation to entails may now be considered as settled law; and they did not think it necessary to go much into the argument drawn from the special clause in this entail, permitting liferent leases. The judgment rested on a different ground.

The Court were of opinion, that under the prohibition to alienate, long leases were comprehended. Alienate is a generic term, applicable to all those modes of which the direct object was to deprive the heirs of the substantial interest in the estate; modes which it was impossible to enumerate, and which must vary and multiply with the ingenuity of practitioners, and the progress of society.

From the earliest period a distinction has been entertained between long leases, and those of an ordinary period required for the purposes of administration; and in contemplation of law, the former have invariably been considered as alienations. Whatever fluctuation there may have been in the definition of a long and a short lease, the distinction has never been lost. In the administration of the Crown lands under the different acts of annexation; in the administration of the great ecclesiastical benefices by the ancient churchmen,—in giving effect to the legal diligence of inhibition,—in determining the powers competent to persons on deathbed,—and in questions under the act 1621, the distinction between long and ordinary leases always has been, and is now recognised, and the former are classed with the alienations.

To define the limit at which a lease ceases to be an act of ordinary administration, and becomes an alienation, is difficult, but the reality of the distinction was not on that account the less evident. This is a point which must depend on the state of agricultural knowledge and the prevailing system of management at the time of its discussion. Perhaps the statute 10 Geo. III. c. 51. afforded the only criterion of the duration of a lease, and declared both the terms and the duration which must be observed in granting a lease beyond the ordinary period. But towards the decision of the present case, the determination of that point was unnecessary, and they did not consider themselves called upon to dictate any criterion for the definition of such a limit. The lease under discussion far exceeded the debateable bounds of validity.

On the 14th May 1806, the following interlocutor was pronounced: "Sustain the defences, assoilzie the defenders from the conclusion of the "declarator, and decern."

And on advising a reclaiming petition, and answers, the Lords adhered, 17th November 1807.

Lord Ordinary, *Glenlee*. Act. *John A. Murray*, *John Clerk*, and *Henry Erskine*. Alt. *J. H. Forbes*, *Mat. Ross*, and Dean of Faculty, *Blair*. *C. Tait*, W. S. and *J. Anderson*, W. S. Agents. *Scott*, Clerk.

J. W.

No. IV. *November* 17. 1807.

KEITH TURNER of Turnerhall, and ANDREW TURNER,

AGAINST

ROBERT TURNER and JAMES WATSON.

TAILZIE.—TITLE TO PURSUE.—1st, *A Lease for a thousand years was reduced, under a prohibition to alienate.* 2d, *The contravener, granter of the lease, being dead, an action, of reduction at the joint instance of the son of the contravener and the next substitute, was competent, although by the Entail the contravener was to forfeit for himself and his descendants.*

ON the 17th July 1688, John Turner merchant in Dantzic, by his testament, directed his trustees to invest so much of his property in the purchase of lands in Scotland, as might yield fifty chalders of victual yearly, and directed these lands to be entailed on a certain series of heirs.

The trustees on the 13th November 1693, and on the 18th May 1694, purchased the lands of Rosehill, Newark, and Tipperty, in the shire of Aberdeen, and disponed them to the different heirs substituted, under the fetters of a strict entail. *Inter alia*, the deed of entail contains the following clauses:

"Providing, likeas it is hereby provided and appointed to be contained in the infeftments to follow hereupon, that it shall nowise be lawful to the said Robert and John Turner and the other heirs of tailzie foresaid, to sell, annalzie, and dispone the lands and others above written, or any part thereof, heritably or irredeemably, or under reversions ane or mair, nor to grant infeftments of annualrent, or yearly duties, greater or smaller, forth thereof; nor to set tacks of the same in diminution of the true worth and rental may be paid for said tacks, without being obliged, nevertheless, to raise the rental in manner after provided, nor to contract debt, or burden the said lands; nor do any other deed whereby the samen may be evicted, apprised, or adjudged from them, or anywise impaired to their prejudice."

Then follows a clause forfeiting and resolving the right of the contravener, and of the *descendants* of his body. The deed afterwards provides, "That the said Robert and John Turner, or their heirs of tailzie aforesaid, shall noways have power to heighten, raise, or augment the rents of the said lands, as the same is presently paid, nor remove the tenants forth thereof, sua long as they punctually and pleasantly pay the same: the said tenants, and each of them, always yearly planting upon the ground of the said lands possessed by them, an oak tree, or fir-tree, or some other commodious tree, in some convenient place of the said lands possessed by them, which may serve either for present decorment of the said lands, or use to the said heirs in time coming."

The

The entail was in every respect regular and effectual, and the successive heirs possessed the estate under it. On the 23d September 1763 John Turner, the heir in possession, granted a lease of the tailzied estate to George Turner of Monzie, a remote substitute, for the space of a thousand years. John Turner died in the year 1802; and in the course of that year his son Keith Turner, who did not in any way represent him, except as next heir of tailzie, raised an action of reduction of the lease on the following grounds: 1*st*, "The said tack or feu-tack, "and right of infeftment, is so very far beyond and different from the "usual nature and duration of leases, that it is to all intents and purposes "an absolute alienation of the said lands, mills, and others, themselves. "2*do*, The said tack and right of infeftment was granted in defraud of "the subsequent heirs of tailzie to the said estate, for a far less rent than "the value of the lands, or even the actual rent thereof at the date of the "same, and since. 3*tio*, With the same view it was also granted before "the expiration of the then subsisting leases of the said lands, mills, and "others, and as such is directly contrary to the said deed of entail of the "said lands and others, under which the said deceased John Turner held "the same." But the deliberation of the Court was solely occupied with the first ground of reduction.

To the title of Keith Turner to pursue, an objection was stated, on the ground of his being the descendant of the contravener, whose right fell to be irritated and forfeited, if the contravention was proved. Andrew Turner, the next heir of entail to Keith Turner, then appeared; and on the 31st October 1804, a new summons of reduction was executed at the joint instance of Keith and Andrew Turner.

The case was reported to the Court by Lord Glenlee, Ordinary.

Argument of the defender.

The action originally brought by Keith Turner was irregular and inept. He had no title to pursue the reduction of the lease, because he is the descendant of the person by whom it was granted. If the lease be a contravention of the entail, the decree which reduces it must also forfeit and resolve the right of the granter, and his descendants. It is declared in the entail, that the contravener shall forfeit the estate both for himself and the descendants of his body, but without any such provisions the law would either have inferred this conclusion, or sustained the lease. 8th Feb. 1758, Hepburn of Humbie, Fac. Coll.

It is now a settled point that if by the conception of the entail, the person contravening forfeits for himself and his descendants, it is not competent to the son of the alleged contravener to object to the acts of contravention. 24th November 1749, Gordon of Carleton, Kilk. No 7. *voce* Taillie;—6th March 1801, Gilmour against Hunter.

The first action being incompetent and void, the second is obnoxious to two objections. 1*st*, The summons was not signeted till the 31st October, nor executed till the 5th November 1804. The period of forty years, therefore, had elapsed, before the act of contravention was challenged;

lenged; and the right of the substitute heirs to reduce was barred by prescription. 2*d*, The object of the second action is to reduce the lease without forfeiting the right of the contravener. Andrew Turner, therefore, has no interest to pursue, and can derive no advantage from success. If it be the purpose of Andrew Turner *bona fide* to reduce the lease and preserve the entail, he must insist in an action, concluding at the same time for an irritancy and forfeiture of Keith Turner's right, and in which Keith Turner must appear as defender, and cannot concur as pursuer. Andrew Turner, therefore, having no interest, has no title to pursue, and his concurrence cannot cure the defect in that of Keith Turner.

Argument of the pursuer.

1. To supersede the necessity of entering into any legal argument on the validity of Keith Turner's title to pursue, an action was raised in the joint names of Keith and Andrew Turner; whether, therefore, the son of a contravener can insist to reduce the deeds of his ancestor, is a question which it is unnecessary to discuss, although it may be considered as *triti juris*, that a declarator of irritancy, after the death of the contravener, cannot have the effect of forfeiting the rights of his descendants. See late case of Hamilton of Bargeny. The case of Little Gilmour against Hunter contained circumstances different from those in the present case; and even if it could be considered as hostile to the plea now maintained, yet it might be questioned how far one decision should have the effect of settling so important a point of law.

The title and interest of Andrew Turner however are beyond challenge. His title is the deed of entail, and his interest the preservation of the estate. The nearness or the remoteness of his interest does not affect the legality of his title, neither is it relevant to enquire into his motive for availing himself of it.

It is impossible now to dispute, after the discussion in the Bargeny cause, that where an heir of entail, not the descendant, and after the death of the contravener, insists for reduction of the deed of contravention, the right of the descendants is not irritated. But although it is impossible in the present case to insist for forfeiture of Keith Turner's right, it does not follow that it is incompetent to challenge the lease granted to the defenders, otherwise this inadmissible conclusion would follow, that the death of the contravener secured the contravention from all challenge.

2. To the plea of prescription, it is sufficient to answer, that after deduction of the minority of Andrew Turner, this action would be brought within the forty years. But at any rate the citation in the former action would have been sufficient interruption. Ersk. b. 3. tit. 7. § 41.

3. On the merits of the question, the argument was the same with that in the case between the Duke of Queensberry and Earl of Wemyss.

The Court pronounced the following interlocutor (14th and 15th May 1806): "Sustain the right of Keith Turner, and Thomas Andrew "Turner, to pursue in the present action; Repel the defences pleaded for "Robert Turner, and his subtenant; and find that the tack under re- "duction is an alienation of the estate, and contrary to the entail, there- "fore reduce, decern, and declare, in terms of the rescissory conclusion "of the conjoined libels of reduction; and, *quoad ultra*, remit to the Lord

" Ordinary to hear parties procurators, and to do therein as he shall see " cause: Find the said Robert Turner liable in expences, and appoint the " pursuers account therefor to be given in to the Court."

And on advising a petition and answers, the Lords adhered, 17th November 1807.

Lord Ordinary, *Glenlee.* Act. *Arch. Campbell.* Alt. *David Monypenny.* *John Morrison*, W. S. and *Wm. Mackenzie*, W. S. Agents. *John Buchanan*, Clerk.

J. W.

No. V. *November* 17. 1807.

SIR JOHN MALCOLM of Balbedie,

AGAINST

GEORGE HENDERSON AND PATRICK BROWN.

RES JUDICATA.—TAILZIE.—1st, *Circumstances in which a decree of absolvitor did not authorise an exception of* res judicata. 2d, *Lease for 99 years was reduced under a prohibition in an entail against alienations.*

THE estate of Balbedie was held under a strict entail, executed in the year 1725; and containing, *inter alia*, the following clause: " And further, it is hereby expressly provided and declared, that it shall " not be in the power of the said Margaret Malcolm, (the institute,) nor " any of the heirs of tailzie, to sell, annalzie, wadset, delapidate, nor put " away any of the lands above mentioned, nor contract debt, nor grant " heritable bonds or other rights and securities therefor, whereby the " said lands, or any part thereof, may be evicted or adjudged from them, " in defraud of the other heirs of tailzie above specified; nor yet to al- " ter this present tailzie and order of succession above mentioned."

The entail contained the following provisions respecting settlements on spouses.

But reserving always, " notwithstanding of the prohibitory clauses " above written, power and liberty to the said Margaret Malcolm, and " the other heirs of tailzie above specified, to provide their husbands and " wives suitable liferents, by way of locality, not exceeding the half of

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" the present rent of the estate for the time," but was entirely silent with respect to leases.

In the exercise of this faculty, the pursuer's father, the heir of entail then in possession, granted a liferent locality of one of the farms, called Easter Balbedie, to his second wife, the pursuer's mother.

Mr Malcolm died in the year 1754, and was succeeded by James Malcolm, a son of his first marriage. In the year 1773, Mrs Malcolm granted to James Malcolm a lease of her locality lands to endure for her life.

In the year 1771, James Malcolm granted a lease of one of the farms of the estate to George Henderson, for the space of 99 years, and at the rent payable by a lease current at the time which had commenced in the year 1752. For this lease a grassum of L. 300 was paid.

In the year 1782, James Malcolm granted to the same tenant, and for the same duration, a lease of another farm, and received a grassum of L. 50. And, in the year 1782, he granted to the same tenant, and for the same duration, a lease of almost the whole remainder of the estate, including the locality lands which he held by a lease from Mrs Malcolm, and he received a grassum of L. 350.

James Malcolm died in the year 1797, and before his mother-in-law Mrs Malcolm, and he never, therefore, had any title to the possession of the locality lands, but what arose from the lease which he held from Mrs Malcolm.

Of all these leases Sir John Malcolm, the next heir of entail, pursued an action of reduction; concluding against the representatives of Henderson, 1*st*, That from the duration of the leases, they amounted to alienations of the property, and it was therefore *ultra vires* of an heir of entail to grant them; 2*d*, That James Malcolm was of a weak and facile disposition, and had suffered enorm lesion by granting them; 3*d*, That during the lifetime of Mrs Malcolm, and during the subsistence of her locality, the heir could not grant a lease on which he could authorise the tenant to possess. The lease of Easter Balbedie, therefore, fell to be reduced both on the general and on this special ground.

The cause was discussed before Lord Craig, Ordinary, who pronounced the following interlocutor: " Before answers appoints the pursuer to " say whether or not he insists on, and will undertake a proof of his " alledgances of facility and lesion; and if he does, ordain him to give " in a condescendence thereof, in terms of the act of sederunt, be- " twixt and first calling of the cause, with certification." The pursuer failed to lodge the condescendence; and the following interlocutor was pronounced: (1st June 1804,) " Having again considered the fore- " going condescendence for John Malcolm, pursuer, with the answers " thereto for George Henderson and Patrick Brown, defenders, replies, " duplies, and whole process, sustains the reasons of reduction, and re- " duces and sets aside the lease of the farm of Craigend or Easter Bal- " bedie under challenge, in so far as the same extends beyond the life- " time of the pursuer's mother, and decerns; but in respect the pursuer " has not lodged a condescendence, in terms of last interlocutur, of fa- " cility and lesion, assoilzies the defenders from the conclusions of the

" action, *quoad* the other leases sought to be reduced, and decerns." In this interlocutor the pursuer acquiesced *.

But the defenders reclaimed to the Court, and their petition was followed with answers.

In the meantime, however, the question between the Duke of Queensberry and the Earl of Wemyss, respecting the power of an heir of entail to let leases, had been agitated, and a hearing in presence in that cause had been appointed. The Court pronounced this interlocutor, (23d May 1805.)

" The Lords having resumed consideration of this petition, with the answers thereto, they supersede advising the same until the question between the Duke of Queensberry and the Earl of Wemyss, in which " a hearing in presence is appointed, comes to be advised." And, on the 18th November 1806, the Court remitted the cause to the Lord Ordinary to hear parties on the length of the leases, and on the other points in the cause. The Lord Ordinary reported the cause to the Court.

The first point agitated between the parties was, whether the acquiescence by the pursuer in the decree of absolvitor amounted to a *res judicata*, in consequence of which any debate on the point of law, with respect to the duration of the leases, was precluded. On this point the same argument was maintained with that in the case, 27th Nov. 1801, Millie against Millie.

2. On the merits, the argument was the same with that in the preceding case, Queensberry against Earl of Wemyss.

17th Nov. 1807.—The Court pronounced the following interlocutor: " Repel the plea of *res judicata*, find that it was *ultra vires* of the de- " ceased James Malcolm, the pursuer's brother, to grant the leases in " question, in respect of the entail and long duration of these leases; " therefore sustain the reasons of reduction of the whole leases libelled, " and reduce, decern, and declare in terms of the declaratory conclu- " sions of the libel, reserving to the defenders their claim for meliora- " tions upon the lands contained in the said leases, and to the pursuer " his objections thereto, as accords."

Lord Ordinary, *Craig*. Act. *David Douglas*. Alt. *Tho. W. Baird*. *M. Sandilands*, W. S. and *Tho. Martin*, W. S. Agents. *Walker*, Clerk.

J. W.

No.

* He alleged that he was in embarrassed circumstances, and that the process was carried on by his creditors, for whose purpose the reduction of the lease of Easter Balbedie was sufficient. But of this there was no evidence except his own assertion, and the Court did not consider the fact to be of any importance.

No. VI. *November* 18. 1807.

WILLIAM AND JOHN CRAWFORD

AGAINST

WILLIAM KERR.

MOVEABLES.—DELIVERY.—*Money being enclosed in a letter, which was wafered, addressed to a certain person, and committed to a servant to be given to a runner to the post-office; the person to whom the letter is addressed was held to have an exclusive right to receive this money in a competition with a trustee (not judicial) for the creditors of the sender, though the sender died while the letter was still lying in his house, and though it was opened and the money retained, and delivered to the trustee by a person who took charge (but without authority) of the deceased's effects.*

GEORGE HENDERSON owed Messrs William and John Crawford L.296. With a view of paying this debt, on the evening of the 30th March, he wrote the following letter :—" Gentlemen, Inclosed " is one half of bank notes and a bill, which, when you receive the " others, per next post, will make L.296, to pay my acceptance to you " due to-morrow; the 2s. I will pay you the first time I am in Leith. " I am," &c.

Having indorsed the bill to Messrs Crawford, he then put it with the half notes into this letter, shut and wafered it, directed it to Messrs Crawford, and gave it, with a penny, to a servant, to be given next morning to a runner who was in use to carry his letters to the post-office. The servant put it in a place where his letters were usually put, to be ready for the runner, who came early in the morning.

Having finished this letter, Mr Henderson then entered in a day-book, which he kept, the bill and notes as remitted, but he postdated this entry, making it the 31st March. The other half of the notes were left in his pocket-book.

Betwixt the hours of four and five of the next morning Mr Henderson died suddenly.

The letter was not given to nor taken by the runner, but was left on a table in the house.

One Mr Stocks, who was in Henderson's house at the time of his death, without any authority, took some management of his affairs; and having found the letter and the half notes that were in the pocket-book, he opened the letter, took out the bill and the other halves of the notes, and received the value of them, having changed the indorsation into an indorsation to himself.

Henderson, though in very good credit at the time of his death, yet turned out to be insolvent; and his creditors, at a general meeting, without any judicial step, chose William Kerr to be trustee for the general behoof. William Kerr received the above sum of L.296

out of the hands of Stocks. He divided the rest of the funds among the creditors, but the division of this sum was objected to by the Messrs Crawfords, who claimed the whole of it. To clear this matter, the trustee raised a process of multiplepoinding, in which he, as trustee, claimed this sum for the general behoof of the creditors, while the Messrs Crawfords claimed it as belonging exclusively to them.

The interlocutor of the Lord Ordinary was, (14th June 1806)—"Prefers the said William and John Crawfords upon the interest produced for them, and decerns in the preference, and against the raiser of the multiplepoinding, for payment accordingly."

And on advising a representation with answers, the interlocutor of the Lord Ordinary was, (12th Nov.)—"Finds that Mr Stocks had no right to break open the letter addressed to the respondents, which appears to have been closed with a wafer, as part of it still remains on the edge of the paper, to score the indorsation upon the bill, to fill up a new indorsation, or in any shape to dispose of it or the other contents of the letter; refuses the desire of the representation, and adheres to the former interlocutor."

The trustee reclaimed; and his petition was answered.

Argument for the trustee.

The trustee is willing to take no advantage whatever from the opening of the letter, but to argue as if it still remained wafered, and was in Court in that state. In that state, he contends that it and its contents would not belong to Messrs Crawfords, because it never was delivered to them.

He admits that there was here an *intention* to make a payment; but the money never having left the house of Henderson, having, till the moment of his death, still remained under his power, and having afterwards fallen under the charge of those who came into his place, that act of delivery on the one hand and acceptance on the other, which is essential to a payment, had not passed, and no payment of course was made.

If Henderson had not died, it is palpable that the money was still in his power, subject to recal, or rather to stoppage.

If, instead of death, bankruptcy had arisen,—if, on the morning that the letter was to be sent off, a sequestration had been obtained, and the sheriff's officer had locked up the shop and warehouse of Henderson; the sending off the letter having been prevented in this way, the payment could not have been held to be made.

Even if the letter had been sent, the creditor might have rejected the bill and notes. They were no legal tender, and the sending of them would have been no extinction of the debt if the creditor had not chosen to accept them.

Thus, it appears, that neither was the payment made, nor was it accepted; and this conclusion is drawn on the supposition that the whole of the notes necessary for completing the payment had been inclosed in the letter. But it was only half bank notes that were in the letter; the other

other halves were to be sent next day, and without them there could be no payment.

In short, in this case there was nothing more than a mere intention and preparation for delivery. It is just similar to that of Salter, 7th Feb. 1786, in which it was found that there was no transmission of the property.

Argument for Messrs Crawfords.

There was not only an intention on the part of Mr Henderson to deliver these notes and the bill to Messrs Crawfords, but he had actually done all that was in his power to deliver them, and had in fact completed the delivery of them. The letter with the penny was given to his servant to be given to the runner, and was lying ready to be given to him before the time of Mr Henderson's awaking in the morning, if he had lived to awaken. Even though he died, it ought still to have been delivered as he had ordered. His servant no doubt would have delivered it, if Stocks had not interfered. But Stocks had not the smallest right to meddle with it. Not only had he no right to open it and to change the indorsation, but he had no right to stop the letter at all. He had no more right to stop the course of this letter than a mere robber, who had taken it from the servant by force, would have had. The delivery, therefore, must be still held to have been completed, notwithstanding this interference. The creditors of Mr Henderson cannot take any advantage of such an illegal act. It is not enough to say, then, that the letter is still to be regarded as unopened; it must be regarded as if it had reached the Messrs Crawfords by the post, in which case there is no doubt they would have been entitled to receive the money for the notes and bill.

There was some difference of opinion on the bench. One Judge observed, That Henderson, after he had written the letter and given it to his own servant, still retained the power of stopping it, as it was still in his own possession by means of his servant: That this right of retaining it, on his death passed to his creditors, and if Stocks had not interfered, it would have come into the hands of the trustee in a legal way: That, in that case, the trustee would not have been bound to deliver it, but would have retained the property for the general behoof of the creditors: That, besides, only one-half of the notes were in this letter, and as to the other halves they were clearly not delivered, which rendered the delivery of the first half, even if it had been delivered, an unfinished step.

On the other hand, it was observed, That in this case there was no sequestration, the trust was merely voluntary, and therefore the creditors had not in them nor had their trustee any right to this money at all: the act of Stocks alone put it into their hands, and that was clearly an unwarrantable act, which the creditors could not take advantage of: The delivery of the letter to a servant, to be conveyed to the postman, gave the person to whom it was directed a right to receive it, the direction having never been recalled by proper authority: That as to the other half of the

notes, not being enclosed, that was of no importance, because payment would have been made by the bank on the first half and the letter.

The Court "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Hermand.* Act. *David Cathcart.* Alt. *Geo. Jos. Bell.*
John Tweedie, W. S. and *J. & T. Peat*, Agents. *Scott*, Clerk.

M.

No. VII. *November* 19. 1807.

JEAN M'LURE, and Others,

AGAINST

WILLIAM BAIRD.

COMPETITION.—*If a creditor use an inhibition against his debtor, and if, after the inhibition, but before any diligence used by any other creditor to affect it, an heritable subject belonging to his debtor be sold by voluntary sale, then the inhibiting creditor will have a preferable claim upon the price of that subject, in virtue of his inhibition.*

JAMES REYBURN was proprietor of a small tenement in Wallacetown. He owed L.100 to David Cumming, and various sums to other creditors. Cumming raised letters of inhibition against Reyburn on the debt due to him, which were regularly executed and recorded on the 2d May 1775. No other creditor did any diligence against Reyburn's estate. In this situation, Reyburn soon after sold the tenement to William Baird, who then held it as tenant for rent. Cumming went abroad in the naval service. His wife, Jean M'Lure, having in vain endeavoured to get payment of the debt due to her husband, at last raised, in his name, an action of constitution of this debt, in which she obtained decree, and afterwards an action for reduction of the sale on the inhibition, concluding also for payment of the rents. She obtained decree in this action also, extracted it, and thereon charged Baird, who presented a bill of suspension, and afterwards brought a reduction reductive of the former proceedings, in which a long and intricate litigation took place. While this depended, an adjudication was led in name of Cumming, whose remaining in life began to be uncertain; and on the other part, Baird got an assignation to the other debts due by Reyburn, and thereon likewise raised an adjudication, within year and day of the adjudication in Cumming's name. A judicial factor was appointed on the estate of Cumming, who was at last ascertained to be dead; and his wife and children

dren sisted themselves in the proceedings above-mentioned instead of him. In the action of reduction reductive the defenders were assoilzied, and the inhibition found good.

The question then, 1st, As to the tenement itself,—2dly, As to the rents since the time of the sale,—took this shape. Jean M'Lure and the children of Cumming claimed the estate, on the inhibition and adjudication in name of Cumming. They also claimed the rents on the inhibition, from the time of the sale, or at least from the time of the decree of reduction; and on their adjudication from the date of it.

Baird maintained, that the adjudication in name of Cumming was void as being led without any authority from him, and that an inhibition alone gave no right to either land or rents, so that they were both carried by his own adjudication, which was the only valid one.

The Lord Ordinary, (29th May 1804) to whom the cause had been remitted, found, "That the inhibition executed by David Cumming in the "year 1774, remained latent till the year 1796, and that this negative or "prohibitory diligence could create no preference on the rents from the "date of the disposition to Baird in the year 1794, prior to the adjudication "led in the name of David Cumming in the year 1800, and that Baird is "not liable to account for said rents: And in respect that the principles "adopted by the court with regard to the action brought by Jean Mac-"lure, and the authority under which she was understood to have acted, "may be considered as sufficient to support the adjudication led by her "in his name; and as Baird's adjudication was within year and day "thereof, finds these adjudications are come *in pari passu*, and decerns."

On a representation for Baird, his Lordship's interlocutor was: "In "respect the adjudication upon which the respondents found in the pre-"sent competition, was led in the name of David Cumming alone, though "out of the country, without mention of his wife or any other person, "as his attorney, finds said adjudication cannot be preferred *pari passu* "along with the representer's adjudication regularly deduced; there-"fore finds the representer preferable upon the rents which fell due sub-"sequent to Cumming's adjudication; so far alters the interlocutor repre-"sented against, and decerns."

The cause came into the Inner-House by petition against these interlocutors, with answers. A variety of arguments are contained in these papers, which it is not necessary to report.

On advising the cause, the Lord President observed,

That the points on which this cause depends had been decided so long ago as the year 1777, in the case of Monro of Pointzfield, on a solemn hearing in presence, a decision of great importance, though unfortunately it is not known, because the decisions for that year are not yet reported. [His Lordship produced the papers in the cause, and notes of the opinions of the Judges, particularly Lord Braxfield and President Dundas.] From these, his Lordship said, it appeared, that in that case there had been an inhibition against the estate of a proprietor of land, who owed other debts besides that to the inhibitor. That, after the inhibition, but before

any other diligence was done against the estate, it was sold, and then, after the sale, adjudications were led by the creditors who had not inhibited, and a competition ensued. In that case the Court were clear, that the inhibitor was preferable for his debt without any further diligence at all. It was held that the sale rendered all diligence by other creditors against the estate void; because as to them it was a good sale, and conveyed away the property from their debtor. Their only claim it was found must be on the price in the hands of the purchaser. But the inhibiting creditor was entitled to disregard the sale altogether, because as to him it was struck at by his inhibition, therefore he might adjudge the estate. But further, his debt being the only one on which diligence could be done against the estate, without regard to the rights of the purchaser, was equivalent to a real incumbrance on it, which the purchaser was entitled to see cleared off before he paid the price, or to pay off himself with the first end of the price. Adjudication by the inhibitor was therefore, though competent, not necessary, because he was sure of payment out of the price of the estate, in preference to all the other creditors. This was solemnly laid down as law by the Court, and particularly explained by the able judges above named in the above mentioned case, and the same rule of law applies to the present case.

Here there is an inhibition; then a sale; then adjudications by the creditors who had not inhibited, and no doubt also by the inhibitor. This last adjudication may be put out of the case. It is argued to be inept, perhaps it is so; but at all events it is unnecessary; the preference of the inhibitor in no degree depends upon its validity, (especially as it may be renewed in more proper form,) but rests upon the effect of the inhibition combined with that of the sale.

By the inhibition the sale to Baird is reducible as to the inhibitors Maclure, &c. Then by the sale all diligence against this tenement by the other creditors of Reyburn is void, since the property was carried out of him, by a conveyance valid as to them, before that diligence was executed. The adjudication, therefore, on their debts is of no effect at all, and can never compete with the inhibitors if they should adjudge even now. This they might do, and their adjudication would still be the only effectual adjudication of this tenement. But it is not necessary for them to do this, because they must be paid in full by the purchaser Baird, who cannot hold the estate, without getting this debt purged on which the inhibition has been raised. Unless, therefore, Baird is willing to give up the estate to them, he must pay this debt, since the seller Reyburn cannot pay it. He may, no doubt, retain it out of the price, but it must be paid to the inhibitors. Now as it may be presumed Baird will not give up this estate, it is not necessary to enter into the other points argued in the papers.

This view a great majority of the Court adopted; and accordingly the interlocutor of Court (19th November 1807) was: "The Lords alter the "said interlocutor, and find that the adjudication led by William Baird is "inept, and that the petitioners became preferable creditors on said sub-"jects and rents thereof, from the fifteenth day of June seventeen hun-"dred and ninety-six, the date of the decree of reduction obtained against "William Baird, in virtue of the inhibition executed by David Cum-

"ming

" ming in seventeen hundred and seventy-four, and decreet of adjudica-
" tion following thereon, to the extent of the debt contained in the said
" adjudication *."

Lord Ordinary, *Hermand.* Act. *David Douglas.* Alt. *Robt. Corbett.*
P. Robertson and *Thos. Grierson*, W. S. Agents. *Scott*, Clerk.

M.

No. VIII. *November* 20. 1807.

CHARLES FERRIER, Trust-Disponee of ROBINSON and COMPANY,

AGAINST

BRITISH LINEN COMPANY.

BANK.—*A bank is entitled to plead compensation upon bills discounted by its agents, though the agents be liable to the bank for payment of the bills.*

CHARLES FERRIER, trust-disponee on the estate of Robinson and Company, brought an action against the British Linen Company for a sum of L.563, belonging to that estate, which had come into their hands. They pleaded compensation, in part, upon a bill for L.240 drawn by Robinson and Company, which had been discounted for the British Linen Company by their agent at Inverness, and had been dishonoured. Ferrier refused to admit this compensation. The Lord Ordinary found, " That the defenders are entitled to retain the amount of the bill discount-
" ed by their agent for L.242."

The pursuer reclaimed.

Argument for Pursuer.—The British Linen Company have no interest in the payment of bills discounted by their agents. The whole risk of discounting lies on the agents from whom the Company equally receives repayment of the sums advanced for discounting, whether the bills are honoured or not. The Company are therefore not entitled to plead compensation on this bill.

Argument

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* This form of the interlocutor does not prove that the adjudication was in itself unexceptionable, but the creditors having no interest to object to it, it was no longer challenged by any body, and therefore stood as valid.

Argument for defender. Not necessary to be stated.

The Court were quite clear that the British Linen Company were not only entitled, but bound to plead compensation for the benefit of their agent, who could not be regarded as discounting for his own behoof, though he was liable by the conditions of his office for the loss on the bills he discounted.

The Court, therefore, "Adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Newton.* Act. *J. Wolfe Murray.* Alt. *Dav. Cathcart.*
Robinson & Ainslie, W. S. and *J. Gilchrist*, W. S. Agents. *Walker* Clerk.

M.

No. IX. *November* 24. 1807.

SIR ANDREW CATHCART'S TRUSTEE,

AGAINST

EARL OF CASSILLIS.

SERVICE.—*Decision that a general service as heir of line and heir-male is equivalent to a service as heir of provision, where it appears from the service that the party serving had both characters in him—reversed.*

This case is already reported, 16th November 1802, which see.

ON appeal to the House of Lords, that Honourable House pronounced this judgment: "It is ordered, &c. that all the interlocutors complained of in the said appeal, so far as the same relate to "the lands and subjects contained in the charter of 1774, or in any "*similar titles*, be, and the same are hereby affirmed: And it is further "ordered, that the cause be remitted back to the Court of Session, to "review all the interlocutors as far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and "Little Enoch, the lands of Portmark and Polmeadow, the tenements "of Maybole, and teinds conveyed by Crawford of Ardmillan, or any "other lands or subjects, the title to which is in dispute in this cause, "if any such there be, not ruled by the foresaid affirmance; and to "hear the parties again as to the effect of the said service as to the said "lands and teinds, and as to the right to the said lands and subjects, and "to do thereupon as to the Court shall seem meet."

When

When the cause came back to the Court of Session, on a petition by Lord Cassillis, to have the judgment of the House of Lords carried into effect, memorials were ordered on the points remitted. The argument in these, so far as it was different from that already stated, run chiefly on the extent of the remit. On advising these memorials, the interlocutor of Court was, (10th Feb. 1807,) "They find that Earl David's "general service in 1776 was not a service as heir of provision, to con- "nect him with the settlement in 1748, or with any similar deed of "provision or settlement, and consequently was not sufficient to carry "the subjects which were specially provided by any such deeds, and "were not contained in the charter 1774, or in any other title-deed or "charter of a similar nature: Find that this description applies to the "lands of Enoch and Little Enoch, the lands of Polmark and Polmea- "dow, the tenements of Maybole, and the teinds conveyed by Craw- "ford of Ardmillan, and that they were not carried by the general ser- "vice: Therefore sustains the reasons of reduction as to these subjects, "and, so far, alter their interlocutor of 16th November 1802, repel "the defences, and reduce, decern, and declare in terms of the sum- "mons." And to this interlocutor, on a reclaiming petition and answers, 24th Nov. 1807, the Court adhered.

Act. Tho. W. Baird. *W. Wallace Brown*, Agent.

M.

NO. X. *November* 27. 1807.

THOMAS BURNS, Petitioner.

PUBLIC ROUP.—*Circumstances which constitute an irregularity in the manner of conducting a public roup.*

THE superiority of certain lands in the parish of Linlithgow, belonging to the poor of that parish, were exposed to public sale, in the town-house of Linlithgow, by the minister and kirk-session.

The articles of roup bore, that the said superiority, which amounted to L.175 of valued rent, "Should be exposed to public roup at the upset "price of L.180 Sterling, during the running of a half hour sand-glass, "and the person offering the said sum, if no other shall appear, or the "highest offerer at the outrunning of the glass, shall be preferred to the "purchase. *2do*, In the event of several offers being made, every offer "after the first shall exceed the offer immediately preceding by twenty "shillings at least, and become bound for the sums offered in terms, and "upon the conditions of these articles."

The clerk of the roup having read the articles, stated that although the articles bore that the subjects were to be exposed during the running of a half hour sand glass, yet as a sand glass was not at hand, and as a watch

would measure the time with equal precision, the latter would be substituted, if the company had no objection. No objection was stated by those present, among whom was Mr Alexander Monypenny writer to the signet, and a watch was used.

The subjects were exposed, and the biddings continued till the price amounted to L.250 Sterling. At this time Burns was the highest offerer; but about three or four minutes before the half hour expired, Mr Alexander Monypenny entered the lists of competition. The bidding continued between these two parties, while the judge incessantly admonished them that the half hour was at the moment of expiry, and the offers succeeded each other with rapidity. Before Mr Monypenny had finished bidding, and abandoned the competition, the half hour elapsed; and the petitioner, who was the highest offerer at the instant of its expiry, was declared by the judge to be the successful competitor, at the price of L.275 Sterling.

Thus no means were taken, by stopping the watch, to prolong the period, although competition had not ceased. Mr Monypenny protested against this procedure, and presented a bill of suspension and interdict, and the kirk-session raised a multiplepoinding, in which the two competitors were called. On the part of the kirk session, no objection to the regularity of the sale was stated.

The Lord Ordinary pronounced the following interlocutor (13th February 1807.): "Finds it to have been provided by the articles of roup, "that the superiority should be exposed at the upset price therein mentioned, during the running of a half hour sand glass, and the highest "offerer at the outrunning thereof should be preferred to the purchase: "Finds, that if such sand-glass had been used, it was competent for, and "indeed the duty of the judge of the roup, by laying the sand-glass on "its side, or making it run backwards to prevent it from running out so "long as there appeared offerers bidding against each other: Finds that "in this case, as the judge of the roup, for want of a sand-glass, made "use of his watch, he ought to have managed it in some such way as "the sand-glass might have been; but finds, as he did manage it, he "made the time to expire, while the two competitors Mr Burns and Mr "Monypenny were keenly bidding against each other, and the judge "declared Mr Burns to be the last and highest bidder, and so preferred "him to the purchase: Finds that this was occasioned by the judge's "misapprehension of what was his duty in such a case; therefore finds "that the proceedings at the roup were irregular, and cannot have "effect."

And the Lords (27th November 1807.) refused a reclaiming petition, without answers.

Lord Ordinary, *Polkemmet.* Act. *Monypenny.* Alt. *John Fullerton.*

J. W.

No.

No. XI. *November* 27. 1807.

JOHN M'KAY, ALEXANDER MUNRO, and Others,

AGAINST

The JUSTICES OF PEACE in the County of Ross.

PUBLIC POLICE.—APPRENTICE.—*Apprentices to artificers in a town are liable in the performance of statute labour upon the high roads.*

MACKAY, Munro, and others, were apprentices to masons, shoemakers, and other artificers in the town of Tain, in the county of Ross. In the month of February 1802, their names were reported as defaulters in performance of the statute labour of the preceding year; and a quorum of the Justices gave the following deliverance, (10th Feb. 1802.) "Having considered the written certificate and report, we do "hereby grant warrant to constables to poind, in terms of law, the "readiest goods and gear of the within named and designed persons "deficient in the statute labour, for payment of the sums annexed to "their respective names."

Of this threatened diligence the apprentices pursued a suspension, wherein the Lord Ordinary (Polkemmet) pronounced the following interlocutor, (21st May 1805.) "In respect that by our acts of Parliament "the Justices have a discretionary power as to the description of parties "to be called to perform statute work upon the roads, that no particu-"lar exemption is by the said act given to apprentices, and that it has "been customary with other neighbouring counties, in similar circum-"stances as to roads with Ross-shire, for apprentices to be called out to "that work; therefore repels the reasons of suspension, finds the letters "orderly proceeded, and decerns."

The cause came by petition and answers before the Inner-house.

Argument for the suspenders.

The regulations which the Justices of this county may have been in the custom of observing, with regard to the imposition of the statute labour, must be disregarded, excepting in so far as they coincide with the acts of Parliament on the subject. Neither can the varying usage of neighbouring counties be of any authority in abrogating or modifying the public law. From the acts of Parliament alone, and the decisions of the Court, must the rule be derived. But the acts of Parliament introducing this public burden were not intended to apply to artificers and mechanics.

Among the improvements in public police, which James VI. transferred from England to Scotland, was the institution of Justices of Peace; and with this institution came the first rude attempts towards a

plan for making and repairing the high-ways, by the general contribution of the labour of the district.

In the 1609, Justices of Peace were introduced; and by act 1617, c. 8. a set of instructions was issued to the Justices for repairing all high-ways to market-towns and seaports. From the existence and powers of heritable Sheriffs, from there being no accurate definition of the persons who were to be liable in this public burden, and no direction as to the mode in which the power of the Justices was to be exercised, these acts were attended with little success; neither does it appear that this measure was at that time enforced in a systematic manner.

By act 1669, c. 38. a set of instructions, substantially the same with the former, was again issued; but it would appear with no better success.

For, in the act 1661, c. 16. the subject of repairing the high-ways and bridges appears, for the first time, to have received the deliberate attention of the legislature; and this may be regarded as the leading statute on this important matter. The statute, in its preamble, proceeds on the inefficacy of the former orders and instructions; and, after describing the persons to whom the enforcing of this branch of police shall be committed, enacts,—"Which persons, or any one of them, to whom "the particular portions of the saids high-ways shall be committed, are "hereby authorised and strictly required, to call and convene all *tenants* "and cottars, and *their servants*, within the bounds," &c.

By this statute a precise description of persons is pointed out on whom this burden is imposed, viz. *Tenants, cottars, and their servants.* The act 1670, c. 9. neither extends nor limits this description, and its object is merely to enable the Justices to receive a pecuniary commutation from those who were liable by the previous act.

In interpreting these successive statutes, the more precise and accurate provisions of 1669, c. 16. must explain and modify the more vague and indefinite terms of its predecessors; and it is clear that the *bona fide* apprentices of tradesmen cannot be included under *tenants, cottars, or their servants.*

The only general statute on this subject is the 5th Geo. I. c. 30. by which the Justices are authorised to convene "*the tenants, cottars, and* "*other labouring men*, within their respective bounds," &c. In fair and rational construction, however, the addition of "other labouring men," when considered with relation to what precedes these words, must be understood to apply only to that class of country labourers who, without being strictly the servants of tenants, are habitually employed in the same sort of labour. The phrase "labouring men," is no doubt not *nomen juris*, or susceptible of exact legal definition, but it never has been held to apply to that class to which the suspenders belong.

The decisions of the Court do not throw much light on the subject, for they relate chiefly to disputes for exemption with the inhabitants of royal burghs.

Thus, in the case of Hamilton against Inhabitants of Kirkcaldy, 24th July 1750,—Kilk. p. 253.—Falc. No. 153. vol. ii.—the only question of importance was, Whether those who claimed exemptions were of characters that would exeem them if they lived in the country: and it was

was observed, that a country man could not be exeemed though he sold trifles, and called himself a merchant. Their plea was overruled.

In the case of the town of Perth, (1st Feb. 1757, Dict. vol. iv. *voce* Public Police,) the question was, whether householders were exeemed, and their plea was overruled likewise, but it was not pretended that those who were not householders were liable.

In a similar question with the town of Paisley (11th January 1758, Trustees of Glasgow Turnpike, Fac. Col. and Dict. *supra*) the Court pronounced an interlocutor, finding the whole inhabitants of the town of Paisley liable, reserving to any class of them who should think themselves aggrieved to apply for redress. It was thus determined, that although the mere residence in a royal burgh afforded no positive exemption, yet these were descriptions of persons on whom the burden could not be imposed.

This decision does not, any more than the former, affect the suspenders. The term *inhabitants*, like that of *labouring men*, is not a *nomen juris* to which a technical meaning is affixed. It is clear, however, that under it all the inhabitants of every rank and sex were not included. It was obviously intended to apply only to householders. This limitation indeed is necessarily connected with the institution of statute labour. For although, in those public burdens which are meant to have a general operation over the whole kingdom, the circumstance of living within the realm is sufficient to infer liability, yet in those which are of a local nature, it is only as an occupant of real property that an individual can be subjected. But none of the suspenders are householders, nor of that description which the Court had in view in using the term inhabitants.

But, farther, their peculiar legal character as apprentices, exempts the suspenders from such a public burden as that of statute labour. During the period of their indenture apprentices cease to be *sui juris*, and their time and industry are the property of their master, without whose direction they cannot be disposed of. Neither are apprentices considered as possessing any property arising from the application of that time and industry, which could be seized as a commutation for any public burden. Even the great duty of public defence, not to mention the obligation of enlistment, is suspended by apprenticeship, *a fortiori*, the duties connected with a local police must be incompatible with that character.

From England the system was borrowed, and the practice of that country ought to have authority. By 13th Geo. III. c. 78. § 35. apprentices are exempted from statute labour.

Argument of the chargers.

To ascertain the doubtful import of a public statute, the general practice which has ensued on it, and the interpretation which the general consent of the people has attached to it, cannot be disregarded. On this the observance of all law depends; by this they are silently abrogated and modified. It is therefore important to state, that by the uniform and immemorial practice of the county of Ross, and of the neighbouring counties, persons in the class of the suspenders have been subjected.

That the Justices have a discretionary power is clear from the statute 1617, c. 8. whereby "the Justices must give orders *as they shall think* "*most convenient, and with least grief to the subjects* for mending," &c.

and the statutes subsequently passed arose out of this, and must be taken in connection with it. The Stat. 1661, c. 38. confers the same powers; and under this, as well as the former, the Justices act under a high responsibility.

That the class of persons designated by the immediately subsequent statute 1669, c. 38. as the subjects of this tax, was not confined to that of those engaged in predial labour, is established both by the practice of counties and the decisions of Court. An exemption in favour of the inhabitants of towns, and of manufacturers and artificers, is not contained in that or any other act. Accordingly, in the first case which occurred, (21st July 1750, Kilk. p. 253.) weavers, masons, wrights, coopers, &c. in the town of Kirkcaldy, were found liable, and the same argument was maintained as in this case.—Falc. No. 153. p. 179. vol. ii.

A few years afterwards a resistance on the part of the inhabitants of the town of Perth to submit to this burden, met with the like fate.—(1st Feb. 1757. *supra.*)

The same was decided in a question with the town of Paisley, 11th January 1758, Trustees of Glasgow Turnpike.—*Supra.*

From this consistent train of decisions, it is beyond controversy settled, that these statutes are not restricted to persons employed in predial labour, but equally include the inhabitants of royal burghs, artificers and tradesmen, as well as householders, who may be called out at the discretion of the Justices.

With as little justice can an exemption on the ground of apprenticeship be demanded. The statute makes no exception of apprentices. In every contract the parties are understood to have been aware of the public law, and of its relation to the obligations which they respectively incurred. The public statute now under consideration had an existence previous to the indentures of the suspenders, and had inferred an obligation paramount to any which they could incur. The master with whom they contracted must be understood to have stipulated for their labour, under a deduction of what might be demanded by this or any other public law.

That the obligation of enlistment is suspended by apprenticeship depends on different principles, and has no relevant application to the present question. The principle of decision there is, that no man after having undertaken one obligation, can voluntarily enter into a second, by which the first may be destroyed or dissolved. On the same principle, a hired servant cannot dissolve his obligation of service by enlistment, 29th June 1742, Wright against Lumsdens.—19th January 1799, Clark against Murchieson.—But a hired servant is undoubtedly liable to performance of statute labour.

The law of England differs from that of Scotland on this subject, and cannot afford any ground for analogical reasoning. By the act of Parliament quoted by the suspenders, both apprentices and servants are exempted, whereas in Scotland servants are notoriously liable. But these exemptions arise from special enactments. The argument of the chargers, therefore, that in the silence of enactment, exemption cannot be presumed, is strengthened.

The interlocutor of the Court was, "Adhere to the interlocutors reclaimed against."

Lord Ordinary, *Polkemmet.* Act. *Tho. Thomson.* Alt. *David Monypenny.*
Agents, *Joseph Gordon*, W. S. and *Wm. Mackenzie*, W. S. *Walker*, Clerk.

J. W.

No.

NO. XII. *28th November* 1807.

ADAM GRIEVE,

AGAINST

LIEUTENANT-COLONEL CUNNINGHAM.

PROCESS.—*Part of a decree giving expences to a pursuer may be carried to execution by him, while the rest of the decree is under appeal at his instance.*

VARIOUS actions depended both in the Court of Session and House of Lords, relative to the farm of Barlaugh, in which Colonel Cunningham, and William and Adam Grieve were parties. The procedure in these actions terminated in several interlocutors. By these the assignation of a tack was sustained in favour of William Grieve, Colonel Cunningham was assoilzied from an action of declarator at the instance of Adam Grieve, and at the sametime the Colonel and William Grieve, the successful parties, (a thing rather unusual) were found liable jointly and severally to Adam Grieve, the unsuccessful party, in the sum of L.216. 16s. 5½d. as expences of process and dues of extract. For this sum Adam Grieve charged Colonel Cunningham, who presented a bill of suspension on this ground, that he was not bound to pay this sum in implement of one part of the decree, unless the party receiving it would promise to submit to the other part of it, and not carry it to appeal. This bill was refused. Colonel Cunningham reclaimed.

Argument for the petitioner.

There is no principle more universally admitted in all systems of law, than this, "*Approbans non reprobat*;" see vol. vii. Bacon, p. 445. "No "man," says Lord Stair, "can approve and disprove the same indivi- "dual thing." But this applies with full and even peculiar force to a decree, which, as it is drawn up with more pains than a private deed, must have its different parts more nicely adjusted to, and more fully dependant upon each other. It is impossible, therefore, that he who has enforced one part of a decree which was in his favour, can be allowed to challenge it *quoad ultra*, because the part he is attempting to overturn, may have been the inseparable condition of that which he has carried into execution. If this were allowed (not to mention less general instances) in every case of decree on a mutual contract, one party might obtain implement of it, in so far as he was creditor, and then appeal against it in so far as he was debtor, though this last was the necessary counterpart of the other. The suspensive effect of an appeal is of itself an evil of sufficient magnitude, but this would be encreased tenfold, if it were left entirely to the appellant's discretion what part was to be suspended, and what executed. A cross appeal is no sufficient cure for

for this evil. It is too late to enter a cross appeal when the appeal comes to be made, for the part that was liable to cross appeal is executed before the appeal is made. It would be necessary, therefore, in all cases where part of a decree is in favour of an individual, and part against him, that he should enter a cross appeal merely as a precautionary measure, however well satisfied he was with the decree on the whole. But our law never can require a party to appeal against a judgment with which he is well satisfied, merely because his adversary chuses to appeal. This absurdity is prevented by the maxim of *approbans non reprobat.*

This maxim is just another expression of the rule of our law, that taking implement of one part of a decree is homologation of the rest, which is established by a train of decisions; 31st July 1560, Laird of Ruthven, which holds even taking instruments to be homologation;—23d February 1566, Montgomery against Ninian Semple, *Balfour*, p. 416;—Duke and Duchess of Monmouth against Earl of Tweedale, *Dict.* vol. i. p. 377. from which the same rule may be inferred. The decrees to which these cases relate are decrees-arbitral, but that can make no difference; and the following cases are exactly in point even in this particular, Brisbane against Harvey, 26th February 1724, *Edgar;*—Hepburn against Hepburn, 1st December 1736, *Clerk Home*; and, Wauchope against Hamilton, 1st December 1711, *Forbes*; where the rule was recognized though the decision went on a specialty. Primrose against Duie, 21st February 1662, *Stair*; is to the same effect, though incorrectly abridged in the Dictionary.

But if the receiving implement of a part of a decree, binds the party to acquiesce in the rest, there is no reason why he should not do it in proper form by a regular written deed at the time when he receives implement? And this is necessary, for he cannot otherwise be with certainty prevented from entering the appeal; and if he should enter it, the other party could have no advantage from that part of the judgment which was favourable to him, till the appeal was decided, even supposing the objection of homologation to be sustained in the House of Lords. The ordinary form of the discharge of a decree is to be found in the Juridical Styles. The pursuer granting that form of a discharge, it is evident, acquiesces in the decree in so far as it is against himself. He discharges the action *in toto*, not merely grants a receipt to account, and never could afterwards ask more in that action by appeal. Why then should not the charger here grant a similar discharge of this action?

Some of the Judges were moved by the arguments of the petitioner, and observed that if the respondent was successful in the House of Lords, the award of expences would not stand, so that it would be unjust to allow it to be executed now, unless that appeal was to be relinquished. That this was not a usual case of expences, being almost the only one where expences had been given to the unsuccessful party, and that the award of expences formed an inseparable part of the decree.

On the other side it was observed, that this award of expences was just in the situation of an interim decree, which is given every day. That, particularly, it is quite common to give a party his expences, and at the same time find that he is entitled to go on with his process. That this award of expences was no condition or inseparable part of the decree, but

but might justly be enforced, though the rest should be appealed or even reversed.

The Court "Refused the petition."

Lord Ordinary, *Glenlee.* Act. *Geo. Cranstoun.* *J. Smith*, jun. W. S. Agent.
M. Clerk.

M.

No. XIII. *December* 8. 1807.

BROWN AND COMPANY,

AGAINST

HUTCHISON DUNBAR.

BILL OF EXCHANGE.—*Noting a bill on the day of payment is good negotiation, though the protest be not extended till some days afterwards.*

ROBERT OGLE of London drew a bill for L.125 on Sinclair Wright of that city. It was indorsed by the drawer to Hutchison Dunbar of Edinburgh, who indorsed it to Brown and Company of Leeds. Brown and Company indorsed it to their bankers in London, Messrs Foster, Lubbocks, and Company. It became payable on the 3d of July 1807, that being the last day of grace; on that day it was presented for payment; and payment being refused, it was noted by William Armstead a notary in the usual way, "2, 6 W. A. 3d July 1805."

Thus noted, but without any regular instrument of protest, it was returned to Brown and Company who wrote immediately to Dunbar in these terms:

"The bill we received from you the 9th of May (say R. Ogle upon "Sinclair Wright, N0. 21. Whitehorse Lane, London, from the 30th "April 1805, at two months, amount L.125.) is returned to us for non-"payment, *but, not being protested, have returned it* to our bankers to "have the needful done. When we receive it, shall send it to our friend "in Edinburgh, who will call upon you for payment."

Dunbar refused to pay the bill. Brown and Company gave him a charge for payment, which he suspended.

The suspender stated various defences, in particular that the bill had not been protested in due time, and that due notice of the dishonour was not given to him, since the letter of the chargers mentioned the bill *not being protested*, which authorised him to think that it was not negotiated, nor any recourse against him intended.

The Lord Ordinary "Sustained the reasons of suspension."

But on a reclaiming petition and answers, the Court were clear that the *noting* was sufficient negotiation, and that the letter, signifying only that

the bill had not yet been *protested*, left fully to be understood the fact that it had been *noted*, which is a common practice, the protest being afterwards drawn out in regular form. The Court therefore altered the Lord Ordinary's interlocutor, and sustained the recourse against the suspender.

Lord Justice Clerk, Ordinary. Act. *James Moncrieff*. Alt. *James Keay*.
S. Macknight, W. S. and *David Wardlaw*, Agents. *F.* Clerk.

M.

No. XIV. *December* 9. 1807.

CHILDREN AND GRANDCHILDREN OF DAVID LINDSAY,

AGAINST

ROBERT DOTT.

Foll^d in McLymont's Lords & Osborne's 16 Feb. 1796.

FIAR & LIFERENTER.—*An heritable subject being disponed, to a grandfather in liferent, and on his death to his daughter in liferent, and to her children by a certain marriage in fee, with an express reservation in favour of the grandfather of power to alter the destination and dispose of the subject, and no such reservation in favour of the mother, yet, on his death, the fee is in her not in the children.*

JANET LAMBERTON, having received money from her father, William Lamberton in trust for that purpose, purchased a tenement of houses, and took the disposition, "To and in favour of the said "William Lamberton during all the days of his life, and after his de- "cease to the said Janet Lamberton, also in liferent during all the days "of her life, and to the children already procreated or to be procreated "of the marriage between her and David Lindsay, equally among them "in fee." A clause was added in these words: "As also providing "and declaring, that it shall be in the power of the said William Lam- "berton by himself alone, without consent of the said Janet Lamberton, "or his said spouse, or their foresaids, to alter or innovate the destina- "tion contained in this present disposition, and to sell, burden, or dis- "pone of the foresaid subjects, either in whole or in part, to any other "person or persons by deed under his hand, at any time during his "life, as fully and effectually as if the names of his said wife and daugh- "ter had not been herein mentioned."

William Lamberton died.—Janet took possession of the tenement; and after some years, her husband being then dead, she disponed it to Robert Somerville, who disponed it to Robert Dott. On the death of Janet Lamberton

Lamberton, her children and grandchildren (one child being dead and represented by grandchildren,) brought an action of declarator and reduction to establish their own right to this tenement, and set aside that of Robert Dott.

The interlocutor of the Lord Ordinary was, "Repels the reasons of "reduction, and assoilzies the defender."

The cause came before the Inner-house by petition and answers.

Argument for pursuers.

1*st*, It is admitted, that in competitions between the rights of parents and children, a parent though, *ex figura verborum*, only a liferenter, yet is often found to be fiar. But this has not been found where the parent liferenter is only an interjected person between the original party and the ultimate fiar. 2*dly*, In this case, the meaning of the term *liferent*, in the conception of William Lamberton the testator, is quite clear and unequivocal from the clause which he has added in relation to his own right. He reserves to himself, *per expressum*, the right of disposal, plainly understanding, that if not so reserved, it would not have been retained under the term liferent. But he uses the very same term in the same way in bestowing the right given to his daughter, so that it must have the same meaning; and as there is no reservation in her favour, she can have nothing more than a liferent, without any power of disposal. This clause, therefore, is just equivalent to the use of the term *allenarly*, which it was decided in the case of Newlands, 9th July 1794, did restrict the right of a parent to a liferent, in circumstances similar to the present in all other respects. The principle of that case was just this, that the *voluntas testatoris*, where clearly expressed, must be effectual to restrict the right of the parent to a liferent, even though the children be *nascituri*; and that the principle, that a fee cannot be *in pendente*, must give way to the will of the donor, where that will is quite unambiguous.

But in this case the children were not *nascituri*. All of them but one were born before the deed was executed, so that there was no legal difficulty in vesting the fee in them*.

Argument for defender.

The interpretation of a clause devising heritage to a parent in liferent, and his or her children in fee, is perfectly established. It is past all question that it gives the fee to the parent. For an example of this rule, it is sufficient to quote the case of Lillie against Riddle, 4th Dec. 1741. Kilkerran, *v.* Fiar, p. 190.

This legal interpretation was originally adopted in contradiction to the meaning of the testator, and it would be so still if his meaning could be

 supposed

* There were some specialties also insisted on, but the Court did not pay any regard to them.

supposed different from it. But in truth this cannot now be supposed. The legal meaning of these words has been so long fixed, that it has become notorious and technical, and it cannot now be supposed that a testator has any other meaning. In framing a deed, it must be presumed that these terms are used in the technical sense, as the language of deeds, not that of common conversation.

It makes no difference that some of the children were already born at the date of the disposition. This is just the common case, where the clause is "to the children procreated or to be procreated," and it never was held to change the interpretation of that clause.

Nor can the reservation of the full right to this subject to William Lamberton himself, or the particular form of this reservation, make any difference in the effect of the disposition to his daughter in liferent, and her children in fee. Whether this disposition took effect in his favour immediately, or at his death, was of no consequence; the form and meaning of it remained the same.

The idea, that the right of the parent being interjected between that of the original party and of the children, must be, on that account, confined to a liferent, is totally unwarranted by any reason or authority. On the contrary, this circumstance occurred, and no such effect was given to it, in the cases of Thomson against Lawson, 4th Feb. 1681;—that of Frog's children, 25th Nov. 1735, Clerk Home;—and that of Campbell against Neil, 14th Feb. 1766.

One judge expressed his opinion, that the words used here were just as clearly expressive of the testator's will, that the fee should absolutely *not* be in the parent, as the word *allenarly* in the case of Newlands;—that the clause of revocation, and the use of the words, "during all the days "of her life," decidedly shewed this. And, therefore, that a decision similar to that of Newlands should be given in this case.

The rest of the Judges thought, that though the decision in the case of Newlands must now be adhered to, yet that, on the principles of that decision, the fee must in this case be found to be in the parent, since there were not here clear taxative words excluding her from it.

The Court "Adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Glenlee.* Act. *John Dickson.* Alt. *Will. Erskine.*
Agents, *John Ross* and *Will. Howieson.* *Buchanan,* Clerk.

M.

No.

No. XV. *December* 10. 1807.

MATTHEW GUTHRIE and OTHERS,

AGAINST

HENRY COWAN.

JURISDICTION.—*By act 39th Geo. III. ch. 66. it is declared that no judgment or conviction pronounced by the Justices under it shall be removable by* certiorari *into any Court whatsoever. An advocation to the Court of Session is nevertheless competent.*

BY act 39th Geo. III. ch. 66. § 17. entitled, "*An Act for better* "*preventing the damaging of Raw Hides and Skins in the flaying* "*thereof*," it is enacted, "That in case any person or persons shall "find himself or themselves aggrieved by the judgment of any such "Justice or Justices, Magistrate, or Magistrates, in any case where the "penalty adjudged shall exceed the sum of 10s., then he or they shall or "may, upon giving security to the amount of the value of such penalty "and forfeiture, together with such costs as shall be awarded, in case such "judgment shall be affirmed, appeal to the Justices at the next general "or quarter-session of the peace, and for the county, riding, division, "city, liberty, town or place as aforesaid, *who are hereby empowered* "*finally to hear and determine the same;* and in case the judgment of "such Justice or Justices shall be affirmed, it shall be lawful for such "Justices, at a general or quarter-session as aforesaid, to award the per-"son or persons to pay such costs occasioned by such appeal, as to them "shall seem meet, *and no such judgement or conviction shall be remove-*"*able by certiorari into any court whatsoever.*"

The pursuers, the inspectors of hides for the district of Paisley, complained to the Justices of Peace of the county, that the defender had in various particulars violated that act, and subjected himself to certain penalties. The Justices decerned against the defender, and their judgment was affirmed by the quarter-sessions. Against this judgment the defender appealed to the Court of Session by advocation. The pursuers contended that the appeal was incompetent. The Lord Ordinary reported the case to the Court (9th March 1805.)

Argument of the pursuers.

In conferring this new branch of jurisdiction upon the Justices of Peace, it was the evident intention of the Legislature, that their exercise of it should be final, and without appeal. They are authorised *finally to determine* the questions that shall arise under this act; and after allowing an appeal to the quarter-session, it is declared that no such judgment shall be removable by *certiorari* into any court whatever. Fair effect ought to be given to the intention of the Legislature, Ersk. b. i.

tit. 2. § 7. In English practice *certiorari* is a mode of appeal from inferior jurisdiction, similar to that of advocation in Scotland; Blackst. b. iv. c. 19. § 8.

The statute extends to Scotland as well as England in all its enactments, and the manner of its administration ought likewise to be the same. The expedience of the restraints and controul imposed by this branch of commercial police, is equally felt in both kingdoms, and in the one as well as the other the protraction by appeal, of all questions arising in the detail of its application, would be equally vexatious and injurious. In fair and rational construction it is impossible to impute to the Legislature the inconsistency of intending that the privilege, or rather inconvenience of appeal, should exist in the one kingdom and not in the other.

In several analogous cases the Court have been influenced by these views: 1*st*, On the act for the better regulation of the linen manufactures, 28th July 1750, Kennoway against Dunlop, Falc., 2*d*, In a case relating to the jurisdiction of the Justices of Peace, 8th January 1756, Justices of Peace of Haddington, Sel. Dec. 3*d*, On the act relating to the commissioners of supply, 9th August 1778, Foote, Fac. Coll. 4*th*, In the case 18th December 1753, Duke of Douglas against Lockhart, of which the argument applies with singular force to the present instance.

The two cases relied on by the defender, were determined on the principle that the Justices had exceeded their power, a principle according to which the Supreme Court controuls all the inferior jurisdictions in Scotland, 25th June 1779, Patillo;—28th May 1793, Countess of Loudon.

Argument of the defender.

From the terms of the statute it does not appear that even in England there was to be no appeal from the decrees of the Justices under this act. There are many modes of appealing from inferior to superior jurisdiction, Black. b. iii. ch. 25. § 3. Cro. Jac. 404. Rar. *Case adjudged.* But of all these modes, that of *certiorari* alone is prohibited. Besides, *certiorari* is a writ of appeal of a more limited nature than that of advocation, and therefore its prohibition in England does not warrant the inference drawn from it.

All new and particular jurisdictions, derogating from the jurisdiction of the Supreme Court, must be taken strictly, and cannot be extended farther than their constitution explicitly warrants, Black. b. iii. ch. 6. § 10. Ersk. b. i. tit. 2. § 7. accordingly in a similar case the Court was influenced by these principles, 10th March 1754, Buchanan against Towart, wherein the argument applies directly to this question.

So likewise, by act 20th Geo. II. ch. 19. § 6. it is declared that *proceedings in pursuance of this act should not be removed by* certiorari, *or any other writ, to any other court at Westminster*; yet appeals to the Court of Session are daily entertained.

To the same purpose is the practice under other acts, 25th June 1779, Patillo.

The Court were of opinion, that in cases like the present, where the privilege of appeal to the Supreme Court was not explicitly prohibited, an

an exclusion of its jurisdiction was not to be presumed. The provision that no judgement or conviction should be removeable by *certiorari* into any court whatsoever, had an exclusive relation to English law and practice. The forms of the English process, the Court were not called on to enquire into, nor supposed to know. These forms were at any rate so dissimilar in the two kingdoms, that from the practice of the one no rule could be drawn for the guidance of the other.

The Court "Advocated, altered, and found expences due."

Lord Ordinary, *Cullen*. Act. *Ar. Fletcher*. Alt. *David Cathart*.
James Smyth, W. S. and *David Stewart*, jun. W. S. Agents. *H.* Clerk.

J. W.

NO. XVI. *December* 11. 1807.

HAMMERMEN of CANONGATE,

AGAINST

JOHN CARFRAE Coachmaker in Canongate.

BURGH-ROYAL *.—EXCLUSIVE PRIVILEGE.—*A coachmaker may make iron-work for carriages within burgh, though not a member of the Incorporation of Hammermen.*

JOHN CARFRAE was a coachmaker in the Canongate of Edinburgh. In order to execute the iron work of the carriages which he sold, he kept a smithy, and employed a number of men in it working on iron. Neither himself nor his men were members of the Corporation of Hammermen of Canongate. Robert Douglas deacon, and John Ross boxmaster of the corporation, presented a petition against him to the sheriff of Edinburghshire, in name of the corporation, praying to have him compelled to enter into it. The sheriff's interlocutor was, "In respect that "it is not alleged that Mr Carfrae carries on the smith work for any "other purpose than coachmaking, Finds that the petitioners cannot "compel him to enter."

The pursuers presented a bill of abvocation. The interlocutor of the Lord Ordinary on the bills was, "Repels the reasons of advocation: "Remits

* Lord Kaimes's title *Burgh-Royal* does not apply well here, for the Canongate is a burgh of barony; but there is no other in the Dictionary for cases of this sort.

"Remits the cause simpliciter to the sheriff, and decerns." The cause then came before the Inner-house by petition and answers.

Argument for the pursuers.

The Corporation of Hammermen has beyond doubt the exclusive right of exercising the trade of a smith within the Canongate, and of compelling all who exercise that trade to enter into that corporation. The respondent has exercised that trade, for he has set up a smithy, and employed a number of men to work in iron after the manner of smiths in the strictest sense of the word by fire, hammer, &c.; and to manufacture nails, bolts, screws, locks, keys, &c. the most ordinary and undoubted produce of the smith trade; therefore he is bound to enter this Incorporation by the constitution of their privilege.

The circumstance that the respondent does not sell this smithy-work in a separate state, but only when incorporated with other materials into a complete article, is no ground of exemption from this obligation. If it were, the privilege of the pursuers would be of little avail, for very few articles of smith-work are sold in a separate state, and still fewer sold in that state from any necessity.

Nor is it any ground of exemption, that the respondent is only a *carriage smith*. The inevitable progress of the division of labour has separated the general trade of a smith into various branches, gunsmiths, locksmiths, tinsmiths, &c.; but all of these have uniformly been included in the Corporation of Hammermen as smiths. The trade of a carriage smith is one branch of the general trade of a smith just as much as any other, and it includes a larger portion of the whole operations included under that name than most of these other branches. Those who exercise this branch, must therefore enter the Incorporation of Hammermen, just as much as those exercising any other. This is not the only trade that has thus been divided. All ancient trades have undergone the same change; and if the division had been allowed to exempt the branches from the obligation of entering into the several incorporations, there would have long ago been an end of all such incorporations.

But this has never been held a legal ground of exemption; on the contrary, in the case of the Wrights of Haddington, 1771, (*Dict.* 3d vol. p. 106. Burgh Royal) it was found that wheel-wrights must enter into the Incorporation of Wrights, which is a similar case to the present.

This part of the trade is said to be *new*, because coaches have been newly introduced; but it is only a new application of the old trade of a smith, which has taken the place in all probability of some former application of it. Almost all productions of this trade have changed their nature since it was incorporated, but that has never been supposed to extinguish the incorporation privileges. Watches and plated work are new inventions, yet the makers of these enter into the Incorporation of Hammermen *. Farther, though the respondent may profess his intention to confine

* The case of Goodfellow, 4th July 1766, is an instance of the contrary being found lawful.

confine his smith-shop to the production of iron-work for carriages, yet the pursuers can have no security that he will do so. The same forge and workmen may produce all kinds of smith work, or he may sell separately the articles he professes to make for carriages, without the possibility of controul *.

Argument for the defender.

Corporations have no right, upon mere *similitude*, to bring a trade within their charter. In the progression of improvements, new arts must be discovered, and manufactures, never in contemplation of the creators of their privileges, brought into common use. The exercise of these new arts, if *bona fide* out of the ordinary range of the old incorporation, is not to be held within its privileges merely because in some part of the operation the aid is required of that kind of labour and skill, or of those materials which are described in the old charter of the craft.

Such arts are quite distinct from mere *parts* or ramifications of the old incorporated trade; and accordingly it has been often found that they do not fall under the privilege of any incorporation. This was found as to mantuamaking, claimed as a branch of their art by the Corporation of Tailors.—Tailors of Perth against Mantuamakers, 4th August 1756; as to the making of hose claimed by the same incorporation in the case of White against the Tailors of Glasgow, 23d November 1762; as to the weaving of cotton claimed by the Incorporation of Weavers, 6th March 1804, Weavers of Lanark against Porteous.

In the present case, the art of making iron-work for coaches is a new art. It was no part of the old trade of the Hammermen. For this sort of iron-work is of no use but for coaches; and was therefore unknown when this corporation was created. As the defender, therefore, confines himself to this new art, he is not bound to enter with the Incorporation of Hammermen.

2dly, This manufacture of iron is merely accessory to the manufacture of coaches, which it will not be pretended is within the privilege of the Hammermen, and such accessory operations cannot subject the manufacturers of complex articles to enter into corporations, though they do form part of an incorporated trade. If they did, such complex articles could not be made at all, for they often include in the manufacture operations forming part of a great variety of trades that are incorporated. But it was decided they did not in the cases of the Maltmen of Glasgow, 22d February 1750, *Falconer*; the Coopers of Perth, 8th July 1752; the Cordiners of Glasgow, 3d December 1756, *Kaimes*; Wrights of Glasgow against Crosie, 8th March 1765.

3dly, The defender is a member of guild; and therefore he may import springs and other articles of iron-work for the use of his manufacture of

* See 29th January 1788, Ireland against Weavers of Glasgow, in which *silk* weaving, a new branch of weaving, was found to be included in the incorporated weaver craft. But the authority of this decision was doubted by the Bench in the case of the Weavers of Lanark, 6th March 1804.

coaches, and if he may import them, it follows that he may manufacture them by his own servants for this purpose. See cases of the Coopers of Perth, *supra*, and Cordiners of Glasgow, *supra*, reported by Lord Kaimes.

The Court unanimously "Adhered to the interlocutor of the Lord "Ordinary."

Lord Ordinary, *Armadale.* Act. *John Jardine.* Alt. *Geo. Jos. Bell.*
Agents, *J.* and *T. Peat*, and *T. Manners.* *Scott*, Clerk.

M.

(BILL-CHAMBER.)

No. XVII. *December* 12. 1807.

MICHAEL FORREST,

AGAINST

DAVID CRICHTON.

JURISDICTION.—*An action of scandal may competently originate before the Sheriff.*

DAVID CRICHTON raised an action against Michael Forrest before the Sheriff of Forfarshire, concluding for damages on account of scandal and defamation.

Forrest objected to the jurisdiction of the Sheriff in such an action. But the Sheriff-depute repelled the objection, and sustained the process.

Whereupon Forrest advocated, and pleaded, that in actions for scandal, the Commissaries possessed an exclusive jurisdiction. Erak. lib. 1. tit. 5. § 30.—Kilk. No. 7. *voce* Reparation.

Crichton answered.—An action for verbal injury or scandal may originate either before the Supreme Court, the Sheriff, the Justices of the Peace, or the Magistrates of a burgh; and if there are any questions of slander, wherein the jurisdiction of the Consistorial Court is exclusive, it is restricted to those in which a palenode or ecclesiastical censure is required.

But that actions for verbal injury, by which fame is attacked, may commence before the Judge Ordinary, is now beyond controversy. Bank. lib. 1. tit. 10. § 24.

Accordingly

Accordingly an action for a verbal injury was sustained before the Supreme Court in the first instance, 4th March 1755, Affleck against Gordon, Select Dec. No. 230.

Such action has also been sustained before the Justices of Peace, 4th Feb. 1752, Bell against Dundas;—and likewise before the Bailies of Edinburgh, 19th June 1750, Hamilton, No. 7. *Kilk. voce* Reparation.

The Lord Ordinary reported the case to the Court.

And the Court unanimously "Remitted to the Sheriff simpliciter."

Lord Ordinary, *Newton.* Act. *Jo. Cunningham.* Alt. *James L'Amy.*
Agetns, *Pat. Orr*, W.S. and *Rob. Speid*, W.S. *Mackenzie*, Clerk.

J. W.

No. XVIII. *December* 12. 1807.

PETER AND CATHERINE SWANY,

AGAINST

BANK OF SCOTLAND.

WRIT.—*Proof by the testimony of the instrumentary witnesses to a deed, that they did not see the granter subscribe, nor hear him acknowledge his subscription, is competent to be allowed before answer.*

PETER and CATHERINE SWANY, representatives of Patrick Swany merchant in Thurso, brought a reduction of a bond of caution, granted to the Bank of Scotland for Alexander Paterson bank agent at Thurso, and subscribed by the said Patrick Swany. The averment on which the pursuers founded was, that neither of the two instrumentary witnesses in the bond saw Patrick Swany subscribe, or heard him acknowledge his subscription; and of this they craved a proof by the testimony of these witnesses. The Lord Ordinary allowed the proof before answer; and, on a reclaiming petition and answers, the Court "adhered to this interlocutor."

The case of Franks against Franks, 9th July 1793, was considered by the Court as fixing the law, that such evidence was competent, whether it might or might not be sufficient to establish the fact averred.

Lord Ordinary, *Robertson.* Act. *F. Jeffrey.* Alt. *Ad. Gillies.*
Agents, *Geo. Napier*, W. S. and *James Ferguson*, W. S. *Ferrier*, Clerk.

M.

No. XIX. *December* 15. 1807.

WILLIAM THOMSON, Petitioner.

PUBLIC POLICE.—NUISANCE.—*Iron Manufactory within Burgh a nuisance.*

THE petitioner, for the purpose of establishing an extensive iron manufactory, purchased certain houses situated at the south back of the Canongate of Edinburgh, which had formerly been possessed by the Commissioners of the Customs as coach-houses and stables. These buildings are nearly 600 feet from St John Street, and lie to the eastward of the road to St Leonard's Hill.

At the southern extremity of the property (which is bounded by the south back of the Canongate,) the petitioner erected a furnace for melting pig iron. This furnace was worked by a cylinder, and not by bellows, so that the production of smoke was comparatively small.

Sir John Stewart, Mr Haig, and others, proprietors in the vicinity, presented a bill of suspension and interdict to have this furnace and manufactory removed as a nuisance; and "the Lord Ordinary (Woodhouse-"lee) having considered this bill, with the answers and replies, passed "the bill, and granted the interdict as craved."

The petitioner reclaimed to the Court; and pleaded,

1*st*, That the alleged nuisance was not of an intolerable kind, was not dangerous to the properties, and did not in any considerable degree impair the comfort and security of the neighbourhood.

2*d*, That this part of the town was the situation of nuisances, the common sewer of that district of the city disgorged itself in this quarter; and nuisances of all kinds, breweries, bakehouses, dunghills, currying-shops, and tan-yards, were frequent in the vicinity.

But the Lords refused the petition, and remitted to the Lord Ordinary to pass the bill.

Lord Ordinary, *Woodhouselee*. Act. *John Clerk*. *Buchanan*, Clerk. *Alex. Glen*, W. S. Agent.

J. W.

No.

No. XX.

December 15. 1807.

DUKE OF QUEENSBERRY AND LORD HOPETON,

AGAINST

THE OFFICERS OF STATE.

JURISDICTION.—*An action of declarator of immunity from taxes imposed by British statutes is not competent in the Court of Session.*

THE Duke of Queensberry and the Earl of Hopeton, proprietors of the lead mines of Sanquhar and Leadhills, raised an action in the Court of Session to have it declared that they were entitled to export the lead produced by their mines, without paying any duty to the King. The Duke of Queensberry founded his claim upon an act of the Parliament of Scotland, passed on the 25th March 1707. The Earl of Hopeton rested his upon clauses of immunity in a variety of charters from the Crown, the last of which was dated in the year 1695. Duties to a certain amount, on the exportation of lead from Scotland, had originally been imposed by Scotch statutes before the Union. But these were repealed by the 6th clause in the act of Union, when the duties then existing in England were extended over Scotland in their stead. A variety of subsequent British statutes had imposed additional duties on the exportation of lead. From all these duties the pursuers claimed an immunity.

The cause came before the Inner-house by report from the Lord Ordinary. At advising, a doubt was started, as to the jurisdiction of the Court of Session in the cause, which appeared to some of the Judges to belong exclusively to the Court of Exchequer. A hearing in presence, and afterwards memorials, were ordered on this point; on advising these, (March 10. 1807,) the judgment of the Court was, "The Lords having "advised this memorial for the Officers of State, together with that "given in for the pursuers, they find that the action of declarator now "insisted in is competent to proceed in this Court; therefore sustain their "jurisdiction as competent to decide therein, and repel the objections."

The cause was again brought before the Court by petition and answers.

Argument for the Officers of State.

I. The present Court of Exchequer of Scotland have an exclusive jurisdiction in questions relating to the King's revenue. The jurisdiction of that Court is derived from two sources; 1*st*, From the power of the old Scotch Court of Exchequer, in the room of which it was substituted; 2*dly*, From the acts of Parliament creating the present Court. It

does

does not appear necessary to enter into an investigation as to the nature of the first. The jurisdiction of our Scotch Court of Exchequer seems never to have been very well defined; and the Court of Session do not seem to have treated it with much respect.

By the sixth article of the act of Union, it was provided, that all the English revenue laws should extend to Scotland. These laws were entirely adapted to English procedure; indeed, part of them consisted in rules of English procedure, and therefore a Court in the English form became absolutely necessary for enforcing them in Scotland. Accordingly it was provided in the 19th article, "*That there should be a Court "of Exchequer in Scotland for deciding questions concerning the reve-"nues of customs and excise there, having the same power and authori-"ty that the Court of Exchequer in England has.*"

In pursuance of this article of Union, the statute 6th Q. Anne, ch. 26. was passed, by which the Court of Exchequer in Scotland is created after the exact model of the English Court of Exchequer, and is declared to be a Court of revenue and *judicature* for Scotland. Its jurisdiction is explicitly defined in the words of sect. 6. The whole of this jurisdiction bestowed on the Court of Exchequer is *exclusive jurisdiction.* The subjects of it are declared over and over again to be ANNEXED to the said Court; a term which, if they are not subjected to its jurisdiction exclusively, can have no meaning at all, since they had previously been subjected to it simply. Indeed, the very nature of this new branch of jurisdiction, as it required a new court, equally required that the old court of Scotland, which could not understand it, should be excluded from meddling with it. Part of it consisted in the official management or superintendance of the officers of revenue, which it is impossible to suppose could be intended to be shared by any other Court than the Exchequer, and yet it is all bestowed by the same form of words. One part is not more annexed than another.

The 17th section of the same act accordingly, which confirms the extension of the whole revenue law of England to Scotland, takes it for granted that these laws were to be cognizable *solely* in the Court of Exchequer. It provides, in the same breath, that they shall extend to Scotland, and be cognizable in the Court of Exchequer:

That the jurisdiction of the Scotch Court of Exchequer was meant to be exclusive, may also be inferred from this, that even in England where all the Courts have similar forms of procedure, and the same law, yet the Court of Exchequer has an exclusive jurisdiction in matters of revenue. It is true, that there the other courts do not decline judging in cases of this nature, but in practice they are prevented from doing so by injunctions granted by the Court of Exchequer, prohibiting the parties from proceeding in those cases in any other Court *. By the use of this form questions of revenue there have always been exclusively appropriated to the Court of Exchequer in practice, so that there can be no reason to doubt what the legislature intended should take place when they annexed them to our Court of Exchequer. The reasons for appropriating

* See Anstruther's Reports, case of Cawthorn v. Campbell, V. i. p. 205.

ing revenue causes to the Exchequer in Scotland were far stronger than in England, and they admitted here of no exception. A simple annexation, therefore, superseded in this country the English mode of vindicating the Exchequer's jurisdiction.

This distinction between the situation of the courts of England and of Scotland, sufficiently appears in another section of the statute, to wit section 7th, where, in providing that the King shall have the same prerogative in procedure that he has in England, it enacts that all suits for any revenues payable to the Crown shall be in the Court of Exchequer. This is just an instance of the general annexation of such actions to the Court of Exchequer, and it is the strongest case of it; for, in England, the Crown may sue in any Court, though it can be sued only in Exchequer. It cannot be supposed that it was meant to allow the Crown in Scotland to be sued in any other court, when it was not allowed to sue but in Exchequer.

This interpretation of the statute has accordingly been adopted both by Bankton and Erskine, and it has regulated the practice of these courts. See Bank. vol. ii. p. 534. Ersk. p. 51. See also the case of the Receiver-General of the Customs against Fogo, Dict. vol. i. p. 507. Mitchell against Commissioners of Supply, 27th June 1743;—Ramsay against Adderton, 17th July 1747, *Kilkerran*, p. 308.;—Eyers against Hunter, 19th January, 1711, *Forbes*, p. 481.

If the Court of Session had possessed a jurisdiction in revenue matters, the records of this Court would have been full of actions of this kind,—suspensions, advocations, actions of all kinds; and above all declarators relating to the revenue would have been common, instead of which they are quite unknown.

Nor can it be said that such actions have been excluded by section 6th merely, for they would have been actions not *by*, but *against* the Crown. In the case of Ramsay against Adderton, the action was against the Crown, and yet the Court refused to receive it. The opinion of Lord Kilkerran in that case is quite free from any distinction; nor is there any vestige in our practice of any such distinction with regard to the exclusive jurisdiction of the Exchequer in revenue cases. It is evident, therefore, that the practice of the Court of Session, ever since the Union, has proceeded upon the above interpretation of the clause annexing revenue jurisdiction in general to the Exchequer without any exception of actions against the Crown.

This jurisdiction, which is shewn to be exclusive, comprehends in the amplest terms all power, judicial and otherwise, for hearing and determining of all actions and questions in law or equity touching the King's revenue, and in particular the revenue of customs, sect. 6th. The same thing appears in sect. 17th.

II. The present question falls under this exclusive jurisdiction. For it is a question in law touching the revenue. It is a question arising out of those English statutes, of which the cognizance was given to the Exchequer, and out of subsequent British statutes, which it cannot be denied were intended by the Legislature to be in exactly the same situation. It is a declarator of the meaning of those statutes. It can be nothing else; for it is impossible that the Court can declare an immunity from

subsequent statutes, unless the meaning of these statutes be declared. Unless that be declared, it matters nothing what was the original purport or validity of the grants of the pursuers. A declarator of that alone is in itself quite ineffective, and it might turn out perfectly nugatory. At all events, that is not the nature of the present action, which expressly demands an immunity from those statutes, and is directly intended to take away a part of the revenue of customs.

It is said that this is a declaratory action, not a petitory action; but there is no distinction in the statute between one and the other, and the terms of it equally embrace both. It is true that the Scotch form of declaratory actions is not known in the Court of Exchequer; but the same questions which are tried by that form may be substantially determined by the forms which are known in Exchequer. There was no reason, therefore, why the statute 6th of Queen Anne should not commit all questions relating to the revenue to the forms of the Court of Exchequer, the only forms that are known in England. Nor can we complain of this, since by the treaty of Union it was agreed, that in matters of revenue, Scotland and England should be on a level.

Further, if petitory actions in revenue cases be incompetent, declaratory must be so too; for if they are not, then every action may be turned into a declaratory form, and the exclusive jurisdiction eluded altogether. In fact there is a declarator included in every petitory action; and it would only be necessary to leave out the petitory part of the conclusions.

If declarators were thus allowed where petitory jurisdiction was exclusively appropriated to another and not inferior Court, a collision of jurisdiction would take place in opposition to the principle upon which it is observed by Lord Kaimes all our jurisdictions are arranged, Law Tracts, p. 243. For the same question might be tried in two courts at the same moment, and determined opposite ways; one might declare the immunity, while the other might levy the duties; or a declarator of immunity might follow after the duties had been ordered by Exchequer to be levied. Here would be a complete collision; neither court would be bound to yield to the other.

III. Nor does this action come under any of the special exceptions to that jurisdiction in revenue matters created by the statute.

The first of these, in section 8th, is not said to have any application to this case.

The only other exception, which is in section 22d, is equally inapplicable. This is not a question regarding "the validity or invalidity and "preference of the title of the Crown, to any honours, manors, lands, "tenements, hereditaments, or casualties." It relates to the revenue of customs which cannot come under any of these denominations. This clause in the statute, on the other hand, relates to that part of the income of the Crown commonly called Crown rents and casualties, not to the public taxes—to the private patrimony, not the public revenue of the Crown.

It has been said that the titles of the pursuers are infeftments; and that by acts 1610, 22, and 1661, 59, the Exchequer cannot judge in questions concerning the validity or invalidity of infeftments.

But these statutes apply only to the old Scotch Court of Exchequer, and have no application to the present. The act 6th Queen Anne contains

tains no notice of them, nor adopts any limitation in the jurisdiction of Exchequer, but those already mentioned. Besides, this question is not a question concerning the validity or invalidity of infeftments. It relates to immunities from custom which have no necessary connection with infeftment. That of the Duke of Queensberry rests on a Scotch act of Parliament, that of the Earl of Hopetoun was originally contained in a tack.

But if there was ever any reason for doubting that the jurisdiction of the Exchequer embraced this case, that doubt has been determined by a sufficient authority. For this very case, in so far as relates to the Earl of Hopetoun, has been repeatedly before the Court of Exchequer. Nay it was judged of by the Scotch Court of Exchequer, before the Union, and before the act 1706, while the acts 1640 and 1661 were in full force. In the year 1694, the Court of Exchequer were aided in investigating it by a committee of Lord President Stair, Lords Newliston, Anstruther, and Fountainhall, who drew up a report on the subject, bearing that the exemption might be secured by an act of Exchequer. The case of Pitforran is another instance where the jurisdiction of the Exchequer has been without objection sustained in a similar question *.

Argument for the pursuers.

I. & II. The Court of Session was originally instituted (act 17th May 1532.) with a universal jurisdiction in all questions of civil right. This was declared by express statute, (act 1567, ch. 18.) in relation to infeftments ratified in Parliament, the only cases in which it was ever disputed; and this universal jurisdiction was undisputed at the period of the Union.

Previous to that period, the Scotch Court of Exchequer never sat as a regular court of law †. The duties they performed were chiefly ministerial. They were, in short, very similar to a chamber of accounts. The Lords Treasurer and auditors appear to have possessed the same powers possessed by the Lords of the Treasury at present, and to have exercised them in nearly the same way. See 7th Parliament of James V. ch. 94.; and 11th Parliament of James VI. ch. 63, 64, 65, 78.

This Exchequer of Scotland at one time, indeed, received some considerable powers, by act 1. Charles I. ch. 18. But these were soon taken away by act of the Estates 1640, ch. 22., re-enacted by act 1. Charles II. chap. 59. (see Lord Stair, b. iv. tit. 1. p. 29.). The statute 1672, chap. 16. was made for regulating the judicatures of Scotland; but it has no provision, nor even notice, relating to the judicial power of the Court of Exchequer.

Sir George Mackenzie, in one place, (Mackenzie's Crim. Law, part 2. tit. 7.) observes that the members of the Exchequer are only his Majesty's

* In this case an exemption from duty on coals, founded on an act of exemption under the privy seal, dated 21st December 1706, ratified in Parliament 21st March 1707, and followed by possession of exemption, was sustained by a judgment of the Barons of Exchequer, dated 21st July 1738.

† See records of Exchequer,—account of it in the report on the records of the kingdom, p. 413.

chamberlains; and in another (Mackenzie's Obser. 1 Charles I. chap. 18.) he says that though they are competent to discuss suspensions of customs or other parts of the revenue, where there is clear law or constant use of payment, yet the Court of Session are judges competent to clear what is law, or to interpret acts of Parliament.

Even in these cases, it does not appear they had any exclusive cognisance, for such suspensions were competent and usual in the Court of Session, Act of Sederunt, 6th Dec. 1677, and see State of Scotland, p. 114.—The only instance where there is any appearance of the Court of Exchequer calling in question the jurisdiction of the Court of Session, appears in the letter from Charles II. to the Lords of Session; and in that letter the determination of the King is adverse to the claim of the Exchequer. Stair's Decisions, 14th June 1665.

Lord Stair has also reported a number of cases relating to the revenue, which were tried, it appears, without objection, in the Court of Session.—See Index to Stair's Dec. article *Taxation*. It seems therefore not to be uncertain, but quite clear, that the Court of Exchequer, prior to the Union, had no exclusive jurisdiction, properly so called, at all.

But it is still clearer that the *declaratory* jurisdiction of the Court of Session was universal, and was not excluded in any branch by that of the Court of Exchequer.

It is necessary to attend to the nature of this latter kind of jurisdiction, which, in the first place, is not merely superfluous, nor differs only in form, but essentially from *petitory*. The direct subject of investigation in a petitory, and in a declaratory action, can never be the same. The judgement prayed for, and the inconvenience to be remedied, are different. If this action were petitory, the demand would be for payment, or for repetition of certain specific sums of duty, the general right of the Crown to levy such duties, or of the subject to exemption, would be considered only incidentally. But being declaratory, the direct object of it is to ascertain a general right or privilege; and it has no relation to any specific sums of duty. The judgment can affect only this general right, and cannot supersede actions in particular cases, but only prepare for them.

Nor can petitory actions supersede declaratory. Various cases may be figured, in which parties may have the strongest interest to have their rights ascertained, where yet they cannot bring a petitory action. This is indeed quite notorious in our practice. It has been a maxim in the law of some countries, and particularly in the civil law, that he who is in possession has no occasion for an action. Hence, with the civilians, all actions are said to be petitory, although certain declaratory ones were of necessity admitted even by them. In this country, we hold, on the contrary, that the owner is entitled, not only to possess, but to have the quiet and secure possession; and we therefore admit of declarators in all cases where it is conceived necessary to preclude future challenge of a right.

Nor is there any thing nugatory in the existence of a declaratory jurisdiction distinct from a petitory. The instance of the commissarial jurisdiction sufficiently proves this, for it is chiefly declaratory, and extends to the declaring of general rights, which the commissaries are far from having

having the power of enforcing by any petitory jurisdiction. It is sufficient that other courts are bound in law to consider the declaratory judgement as a *res judicata*, and to apply it without a new discussion in all the petitory questions involving it. So long as no declaratory judgement is pronounced by the proper court, other courts, having petitory jurisdiction, may decide the same point incidentally in petitory questions; but wherever it is pronounced, their judgements in these questions must be regulated by it; so that there cannot possibly be any collision of judgements. The observations of Lord Kaimes have no application to such a case as this, otherwise they would be contrary to our common and notorious practice.

Such being the nature of declaratory jurisdiction, and the Court of Session being at the Union in full possession of it, by the 19th article of the Treaty of Union it was declared, that the Court of Session "shall "remain in all time coming in Scotland as it is now constituted by the "laws of that kingdom, and with the same authority and privileges as "before the Union."—After which the words of any statute must be very express by which any part of the jurisdiction of that Court is taken away.

The 6th section, which constitutes the jurisdiction of the Exchequer, has no such explicit mention, nor indeed any mention of exclusive jurisdiction. The term "annex," merely means to join firmly. It clearly bestows this jurisdiction on the Exchequer, but does not exclude other courts.

The 7th section alone creates any exclusive jurisdiction, and this is confined to petitory actions for debts due to the Crown.

All the other parts of the act are consistent with this interpretation, and the decisions quoted on the other side were all given in cases which came under this section 7th. That of Ramsay against Adderton properly related to Justices of the Peace only, not the Court of Session, and was upon a special statute, 6th Geo. I.

On the other hand, the Court of Session judged without objection in questions arising out of revenue statutes, in the cases of Hamilton against Legrand, 4th Dec. 1733, Dict. v. i. p. 507.—William Reid, 19th July 1765.—Ogilvy against Wingate, 1st Feb. 1791 *.—Locke against Tweedie, 3d Dec. 1793.—Robertson against Jardine, 6th July 1802.

These cases were held not to belong exclusively to the Exchequer, because, though not declaratory, they were not actions *by* the Crown for its revenue. But with regard to declaratory actions, the matter is still plainer. These could not be transferred exclusively to the Court of Exchequer, because the forms of Exchequer do not admit of any declaratory action. There is no clause in the statute simply extinguishing the declaratory branch,—a distinct and valuable branch of the jurisdiction of the Court of Session, in all questions having relation to the revenue. Sect. 6th, even if *annexing* means *exclusively annexing*, cannot affect this jurisdiction, which is not *annexed* at all to the Court of Exchequer.

As to the English Court of Exchequer, the exclusive power of that Court rests on the prerogative of the Crown, which may sue in any court it pleases, and may be sued in any court, unless an injunction is moved in Exchequer by the Crown counsel. If this is to be the rule here,

* Affirmed on appeal.

there can be no doubt of the competency of the present action, since the Crown counsel have never moved for any injunction.

III. But, further, supposing the present question to fall under the general rule laid down in the 6th section of the act of Queen Anne, it does also fall under the exceptions made by the same act, from that rule.

When the extension of the English revenue law to Scotland led to the establishment of an English court here, our ancestors were careful to prevent that important branch of our law which relates to heritable rights from being taken away in any degree, by this new establishment, from our own municipal courts.

Accordingly, the statute establishing the Court of Exchequer provides for the two cases in which this might have happened, 1st. By section 8. for the case where the Crown claimed heritable rights in execution for debt,—2dly, By section 22. for the case where it claimed such right directly by purchase, forfeiture, or any other title.

It cannot be imagined, that in this last provision it was meant to make a distinction between the case where the validity of the Crown's title was directly disputed, and that where the Crown's right depended on the disputed validity of the subject's title. In questions of servitude, for instance, whether the Crown claimed a servitude on its own title, or claimed an immunity from servitude by impugning the title of a subject to a servitude on its lands, the case would equally fall under the terms of this section 22. The present case, therefore, where the Crown claims a right by denying the validity of an heritable right in the pursuers, must fall under it: For the rights of the pursuers are undoubtedly heritable, since they are inseparably connected with lands, and are carried as pertinents of the rights of property in lands by infeftment, just as a servitude of road is. They fall strictly under the term hereditament, used in section 22.

It is very true, that the committee of Judges of the Court of Session, to whom the Lords of Exchequer referred the claim of the predecessor of Lord Hopetoun, did declare, that redress might be afforded to him "by an act of Exchequer, without a reduction," because the Exchequer could prohibit the King's officers from levying the duties; but the very expression shews that the regular form would have been a reduction, which must have been in the Court of Session.

In the case of Pitferran, the officers of the Crown had accepted of conditional bonds for the duties, and they demanded the sums contained in the bonds. The direct object of the action was therefore a specific debt due to the Crown; and, indeed, a suit for the payment of a bond granted for duties, is one of those which the 7th section of the act of Queen Anne expressly declares shall be in the Court of Exchequer.

IV. There is still another view which may be taken of the present question. From the provisions of the treaty of Union, in regard to these rights of exemption, the jurisdiction of this Court must extend to them, whatever construction might be put on the act of the 6th of Queen Anne when considered by itself.

This act must have been in contemplation at the time of the treaty, and only follows out and completes the measures then agreed upon. It must be explained, therefore, in consistence with the act of Union.

Now,

Now, the 6th article of this act, which provides that the duties of customs and excise payable in England shall be extended to this country, or which, in other words, declares that the English revenue law is to be received in Scotland, expressly excepts such exemptions as those of the respondent. The object of this saving clause is to preserve such private rights of exemption from the operation of the English revenue law, and to leave their validity and extent to be regulated as before by the law of Scotland, and of course to be tried in the municipal Courts of Scotland to whom the administration of that law was left.

Under this article, then, the pursuers have a right to have their exemptions maintained entire as they stood at the date of the Union, and to have this done by a judgment of the Court of Session.

Replied for the defenders.

II. The case of Reid was an action of damages, not for what was done in execution of excise duty, but for what was done under a false pretence of that duty. It appears to have been entered on the books of sederunt, in order to shew that the Court of Session did not approve of the practice of removing cases from them by injunction; but that only shews that they regarded the proper jurisdiction of the Exchequer as simply exclusive, and not requiring any such form to protect it.

The case of Wingate was brought into this Court by appeal from the Justices of the Peace, to whom a peculiar jurisdiction in such cases is given by statute. Nor does it appear that the point of jurisdiction was ever considered in that case. Besides, it was argued in that case, that the landlord's right was one which came under the first exception of the statute of Queen Anne as a *real right*; and though the argument is not a very good one, it might naturally induce the Court not to reject the cause till they ascertained whether it did so or not, since, if it did, it was supposed that the right fell under the jurisdiction of the Court of Session like a right to lands.

The two other cases, of the factor on the estate of Leslie against Tweedie, 3d Dec. 1793,—and of Robertson against Jardine, 6th July 1802, which were decided on the authority of the case of Wingate, seem to have been similar to it in so far as regards the present question. They came before the Court of Session by appeal from the Justices of the Peace, to whom a peculiar jurisdiction is given by statute; and in neither of these cases does any objection to the jurisdiction seem to have been at all in contemplation.

IV. The exemptions saved by the act of Union, are exemptions from *duty*, not from *revenue jurisdiction*, and the jurisdiction of the Court of Exchequer extends to the interpretation of the act of Union as well as of any other act, in so far as it relates to the revenue.

On advising the reclaiming petition and answers, the interlocutor of Court was, "Alter their interlocutor reclaimed against, sustain the objections which have been stated to the jurisdiction of this Court, and dismiss the action of declarator as incompetent, and decern."

The Court was much divided in opinion;—the last interlocutor was pronounced by a majority of seven to six, the Lord President being against the decision.

It was particularly observed on the Bench, on the side of the majority, which in general adopted the arguments of the defenders,

That the Exchequer certainly had an exclusive jurisdiction in matters of revenue. But that this would be taken away from them altogether, if they might in every case be controuled by a judgment of this Court, obtained in the very same question by a declaratory action. That that might certainly be done if this Court exercised an unlimited declaratory jurisdiction in revenue questions, since every action in Exchequer might be met by a counter-declaratory action in the Court of Session: That a collision and contradiction of judgments must ensue if this were permitted, because the Court of Exchequer is a Supreme Court, with full jurisdiction in relation to revenue questions, and no ways bound to alter its decisions, or rules of decision established by its own judgments, in consequence of any declaratory judgment of this Court. But that this is prevented by the exclusive transference of all questions of revenue to them, to be decided according to their forms, such as they are.

That the instance of the Commissary Court is not conclusive, because that court is not supreme, and because it has a defined and limited declaratory jurisdiction.

On the other side it was observed, in addition to the arguments of the pursuers, which were generally adopted by the minority,

That the question arises on the construction of a clause in the act of Union, not the only clause in that act which requires construction: That it would be extraordinary if it was not competent to get an interpretation of the act of Union by the Supreme Civil Court of this country: That, supposing a question as to the provision of the ecclesiastical establishment of this country were stirred, this could not be referred to the General Assembly, but to the Supreme Civil Court; or if a question were to arise on that act relative to the rights of the Court of Admiralty, that question must be tried in this Court: That, supposing an officer should levy duties in violation of the act of Union, the Court of Session is certainly competent to try that question: That, in the same way, it is here pleaded, that the pursuers have private rights which, by the act of Union, are exempted from the revenue law, and the Court of Session must determine whether they are so or not.

Lord Ordinary, *Craig.* Act. *Gillies, Irving,* et *Murray.* Alt. *Advocatum,* *Solicitor, Dav. Monypenny,* et *J. H. Mackenzie.* *C. Tait,* W. S. and *Hugh Warrender,* W. S. Agents. *S.* Clerk.

M.

No.

No. XXI. *December* 18. 1807.

LADY PULTENEY,

AGAINST

Miss CHRISTIAN ANN STUART and her Guardians.

Husband and Wife.—*Moveables falling to a wife during her husband's lifetime by the death of her father, but not being vested in her by confirmation till after her husband's death, yet are affected by the* jus mariti, *and shall be shared by the representatives of her husband.*

In July 1799, while the pursuer, Margaret Stirling, afterwards Lady Pulteney, was the wife of Mr Steuart of Torrence, her father, Sir William Stirling of Ardoch, died, and left moveable property of considerable value. Certain questions having occurred among his daughters and co-executors, Mrs Steuart, and her three sisters, in regard to it, a submission was entered into; and, in the mean time, no confirmation or possession of the property by them took place. While things were in this situation, Mr Steuart died in May 1801; and, in July of the same year, a decree-arbitral was pronounced, on which his widow took possession of her share of her father's moveable subjects. A doubt having arisen whether one half of this property did not fall to her daughter, Miss Christian Ann Steuart, as representative of her father; a multiplepoinding was raised by Thomas Graham, debtor in a personal bond, which formed part of the subjects in question, and a declarator was brought by Mrs Steuart, then Lady Pulteney, against her daughter, to have it found that she had right to the whole succession derived from her father, Sir William Stirling. The Lord Ordinary conjoined these two processes, and reported the cause on informations.

Argument for the pursuer.

The moveable property in question was never vested in the pursuer during the subsistence of the marriage. It fell to her in the way of succession, and could not be vested without confirmation. If the pursuer had died without confirmation, the property would have remained *in bonis* of her father, and could only have been taken up by her sisters as *his* next of kin. Her husband could have had no right to it if he had survived her, nor can his representatives, now that he has predeceased, have any right, because, without being vested in her, it could not fall under the *jus mariti.*

Argument for the defender.

The *jus mariti* is, in the words of Lord Stair, "a legal assignation to "the wife's moveable rights, needing no other intimation but the mar-

" riage." It is therefore equivalent to a voluntary assignation, and it is an onerous assignation, *ad sustinenda onera matrimonii.* It should therefore receive the most liberal interpretation, and be held to include every moveable right which it is in the power of the wife to bestow.

Having made this assignation, the wife is under an obligation to give it full effect, by adhibiting every form which is necessary and in her power. If she should refuse, the husband may himself take the necessary steps for this purpose, the marriage being equivalent to a mandate to that effect; but though this be omitted on his part, the obligation on the wife is not extinguished, nor can she take advantage of her own failure in implementing it. She is still bound, as in the present case, to do it after the death of her husband in favour of his representative.

If, instead of this tacit assignation, an express postnuptial contract had been entered into, by which the petitioner assigned the property in question to her husband, she could not have refused, after his death, to allow his representative the use of her name in completing titles to the subject. Yet this would only have been a written expression of the tacit legal contract, which is equally binding without writing, and must have the same effect.

The pursuer, therefore, having now made her right complete, she is bound to make it over to the defender. But this is unnecessary, for the principle here applies *jus superveniens authori accressit successori.* By this principle, conveyances, originally ineffectual from want of right in the granter, become valid when the granter's right is afterwards completed, and are held to be in all respects as if valid from the beginning, 22d Dec. 1738, Neilson against Murray, &c.—and 10th Dec. 1742, Paterson against Kellie, both in Clerk Home; which shew the application of this rule to heritable rights, and Lord Stair, B. i. tit. 4. § 9. who expressly applies it to assignations. As then, in this case, the pursuer has now completed her right, it must operate *retro*, and give legal effect to the assignation to her husband.

A right falling to a wife by succession, but not confirmed, is very similar to a right assigned to her, of which the assignation has not been intimated; yet, in the latter case, if the husband die before intimation, it has been found that the right fell under the *jus mariti*, 29th January 1663, Scot against Dickson.

Replied for the pursuer.

The principle, *jus superveniens*, &c. does not apply, because it is founded on the obligation of absolute warrandice. Accordingly, when the conveyor is not liable in warrandice, as when the transmission is not voluntary but judicial, this principle does not apply. A legal conveyance, not by voluntary act of the party but by the act of the law, transmits the right *tantum et tale*, and any right afterwards acquired cannot accresce. Such was the conveyance in the present case. This legal assignation of marriage contained no absolute warrandice, but carried the right *tantum et tale.* There was no obligation on the wife to complete her right, nor had she it in her power to complete it so as to bring it under the *jus mariti.*

The

The case of non-intimation of assignation is very different from that of non-confirmation of succession. Without confirmation there is no right vested; but intimation is not necessary to vest a right, though it is necessary to put the debtor in *male fide* to pay to the assignee.

A case more analogous to the present, is that of a conditional debt due to the wife, the condition of which does not exist till after the marriage is dissolved. This subsequent purification of the condition, it might be said, would operate *retro*, but the contrary has been found, 18th Nov. 1694, Fotheringham of Pourie against Earl Home, *Fountainhall*;—and laid down by Lord Bankton, b. i. tit. 5. p. 87.

There was some division of opinion in the sentiments expressed by the bench, the minority adopting the arguments of the pursuer, the majority those of the defender. The interlocutor of Court was, "The "Lords, in the declarator, sustain the defences, assoilzie the defender, "and decern; and, in the multiplepoinding, find Christian Ann Stuart, "eldest daughter of the late Andrew Stuart, Esq; as his executrix, en- "titled to her mother's share of the moveable estate of her grandfather, "Sir William Stirling, the same having belonged to her father, *jure* "*mariti*; and that she is entitled to complete her right thereto by con- "firmation, or otherwise, in her mother's name, if necessary; and re- "mit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Glenlee*. Act. *David Monypenny*. Alt. *David Douglas*.
Will. Wilson and *James Dundas*, W. S. Agents. *Scott*, Clerk.

M.

No. XXII. *January* 12. 1808.

SIR JAMES NORCLIFFE INNES and Brigadier General WALTER KER of Littledean, and RICHARD HOTCHKIS Writer to the Signet, his Attorney,

AGAINST

JOHN BELLENDEN KER, ESQ.

TAILZIE.—*Under a clause*, "*Reserving always liberty and privilege to* "*our saids aires of tailzie to grant fews, tacks, and rentals of sick* "*parts and portions of the said estate and living as they sall think* "*fitting, providing the samen be not made and granted in hurt and* "*diminution of ther rental*," *the heir found not entitled, by one gratuitous act, to feu out the whole estate for the purpose of altering the order of succession.*

BY the entail of the estate of Roxburgh, dated 23d Feb. 1648, and which, by a decision of the Court, already reported, 23d June 1807, has been determined to be an effectual entail, and the regulating investiture,

titure, it is provided, "That it shall not be lawful to the persons before "designit, and the airis male of their bodies, nor to the others airis "of tailzie above written, to mak or grant any alienation, disposition, or "other right or security qtsomever of the saids lands, lordship, baronies, "estate, and leiving above specified, nor of no part thereof, nather zitt "to contract debts nor do any deidis qrby the samen, or any part there-"of, may be apprizit, adjudgit, or evictit fra them, nor zitt to do any "other thing in hurt and prejudice of thir pntis. and of the foresaid "tailzie and succession in haill or in part of all, quilk deides, sua to be "done by them, are by thir pntis. declarit to be null and of nane avail, "force, nor effect: Reserving always liberty and privilege to our saids "airis of tailzie to grant feus, tacks, and rentals of sick parts and por-"tions of the said estate and living as they shall think fitting, providing "the samen be not made and granted in hurt and diminution of the "rental of the samen lands and others foresaids, as the samen sall hap-"pen to pay the time the saids airis sall succeed thereto."

On the 26th September 1804, the Duke of Roxburgh executed, in favour of Mr Bellenden Ker, 16 feu-dispositions, relating to as many portions of the estate of Roxburgh, and comprehending the whole of it, with the exception of the mansion house and about forty acres round it. These dispositions were all conceived in terms exactly similar. After containing a grant in feu-farm of the lands respectively therein conveyed, they provide, that they shall become void and null, 1*st*, "In case "there shall exist at my death any descendants of my own body; and, "2*dly*, they shall become void and null in the event of the said John "Bellenden Gawler, or his foresaids, establishing in their persons right "to and possession of my estates, contained in a deed of entail executed "by me on the 18th day of June last, in virtue thereof, or of any other "deed of entail which I may hereafter execute in virtue of the powers "thereby reserved to me; and which declarations shall be verbatim in-"serted in the infeftment to follow hereon, and in all the subsequent "transmissions of the saids lands and others."

The feu rights then impose a burden of feu-duty equal to the rents of the lands at the time; but the casualties were taxed in the following manner: "And also paying 1s. Sterling yearly at the entry of each heir, "and 2s. at the entry of each singular successor, and these for all other "burdens, exactions," &c. By a subsequent clause, it was declared, that the disponee "should be entitled to retain, out of the said feu-duty, the "amount of the public burdens on the lands disponed, and to apply the "same in payment thereof, in case it should be found that, by the "investitures under which his Grace held the said lands and others, he "had power to allow such deduction."

The term of entry was declared to be at Martinmas 1804.

Of the same date with these feu-dispositions, a contract was entered into between the Duke and Mr Bellenden Ker, upon the narrative of the lands, and declaring the intention of the parties to be of the following import:

First, That Mr Bellenden Ker should immediately execute a disposition and deed of entail of the lands and others disponed to him by the sixteen several feu-dispositions, by which this property should stand limited

to

to the same series of " heirs of entail appointed to succeed to the lands " and estate belonging to the said William Ker, Duke of Roxburgh, " by the foresaid deed of entail executed by him on the 18th day of " June last;"—" with and under the conditions, provisions, restrictions, " limitations, exceptions, clauses irritant and resolutive, declarations, " and observations specified in the said entail."

Secondly, That during the lifetime of his Grace, it " should be in the " power of him and of the said John Bellenden Gawler, or, after his " death, the institute or heir of entail in possession for the time, by a " writing to be subscribed by them jointly, to alter, revoke, or annul in " whole or in part, the said deed of entail."

Thirdly, Certain legacies and annuities to a considerable amount were to be paid by Mr Bellenden Ker out of the surplus rents arising from the *dominium utile* of the estate, which should fall due and become payable after his Grace's decease, reserving to him relief for all these payments, from certain funds vested in trust by a deed dated 18th June preceding.

Fourthly, That Mr Bellenden Kerr should pay to the Duke of Roxburgh, during his life, the whole surplus rents of the lands, and should also " permit and allow to the said Duke, during his life, the possession " and enjoyment of whatever part or parts of the lands and others con- " tained in the said feu-dispositions, which now are, or shall be, or be- " come out of lease, and which the said Duke shall incline to keep unlet; " and also full power and liberty to the said Duke to cut, dispose of, and " carry off, the wood and trees on the lands and others, contained in the " said sixteen feu-dispositions, at his pleasure, and to apply the price or " proceeds thereof to his own use, without being liable to account for " the same to any person whatever." And to render these provisions more effectual, it was farther provided, " That any leases of the said " estates, which shall hereafter be granted during the lifetime of the Duke, " shall be made with his consent and approbation as a party thereto, for " a term not exceeding twenty-one years, and without any fine or gras- " sum being taken therefor; and by such leases the tenants shall be bound " to pay their whole rents to the Duke during his lifetime; in consider- " ation whereof, he shall, on receiving such rents, grant discharges to the " said John Bellenden Gawler and his foresaids, for the feu-duties of the " said lands and others, corresponding to the periods for which the said " rents are paid." And,

Lastly, That Mr Bellenden Ker, when required, shall grant a liferent tack to the Duke, of the said estate, at a rent equal to the feu-duty; and which tack shall contain an express provision in favour of the Duke, to cut, dispose of, and carry off the woods and trees on the said lands, and apply the price and proceeds thereof to his own use, without being liable to account for the same to any person whatever.

In implement of the contract, a deed of entail, in the terms dictated, was executed by Mr Bellenden Ker.

These feu-dispositions were said to be delivered. But infeftment was not taken on them till the 15th, 16th, 17th, and 19th days of October 1805, when the Duke was *in extremis*.

It

It appeared that Mr Bellenden Ker subscribed as an instrumentary witness to a lease by the Duke of part of the feued lands, in favour of the Duchess of Roxburgh, after the date of the feu-dispositions.

The Duke of Roxburgh died on the 22d October 1805.

Sir James Norcliffe Innes, and Brigadier-General Walter Ker, of whose title and interest under the entail 1648, and other investitures of the Roxburgh estate, a detailed account will be found in the question relating to the competition of brieves, reported in a former number, instituted an action against Bellenden Ker for reducing these feu-dispositions. Counsel were heard in presence; and the case was stated in memorials.

Argument of the pursuer.

I. As to the principle of interpretation, and the import of the clause reserving to the heir a right to grant *feus, tacks, and rentals.*

That the estates of Roxburgh are subjected to the fetters of the strictest entail known in law, that alienations *inter vivos*, whether directly or indirectly, are effectually prohibited, and that the order of succession cannot be altered, are points admitted by the defender as determined. Such being the terms of the investiture, the natural condition of the property is inverted, and restraint has become the ordinary and presumed condition of those on whom the succession devolves. The clause of reservation, then, is a modification of this general condition of the property, and is a special exception to the general rule of restraint. Like every exception, therefore, it must be interpreted strictly, and in such a manner as least to injure or destroy that rule to which it stands immediately opposed.

By the clauses of the entail preceding that of which the import is the subject of the present dispute, the heirs are effectually prevented from doing any thing in prejudice of the *tailzie in hail or in part.* Under these clauses, no feu, however small, or however conducive to the melioration of the estate, could have been granted; nay, not even a lease of a few years endurance. For a lease of ten years was then accounted a species of location beyond the terms of useful administration. To remedy the possible inconvenience thence arising, this clause of reservation is introduced. But that its introduction was intended to sanction transactions for the defeat and annihilation of the entail, is not to be presumed.

The reserved power to feu is certainly *discretionary*; but the inference from thence that it is unlimited is neither sanctioned by law nor reason. Between a discretionary and an unlimited power, there is a palpable distinction. The limits of that discretion are to be found in the avowed object of the entail. Under this clause, the sound discretion of the heir in possession, according to the infinitely varying circumstances in which he may be placed, must be exercised, and its limits must be determined by a series *rerum judicatarum* in similar and analogous cases.

Without defining the precise boundary of this discretion, which would certainly be difficult, and for which there is perhaps not yet a sufficient number of judicial decisions, there can be no hesitation to say that in the present

present instance this discretionary power has been illegally exercised, and enormously exceeded. Thus in the late case of the Duke of Queensberry against Earl of Wemyss, without defining the limits of the power with respect to the duration of leases, it was unanimously determined that the exercise of it therein debated could not be supported.

To afford *criteria* for the decision of the present case, it is clear,

1*st*, That the feus must be such as the heirs of entail *shall think fitting*. This word is not synonymous with *caprice or arbitrary choice*, but refers to the expedience or fitness of the measure itself. This fitness can only relate to what is useful and necessary in the fair and ordinary administration of the estate. Of this fitness, the heir in possession is the first judge; and in doubtful cases his pleasure will decide, but it by no means follows that his arbitration is beyond the reach of controul. When this distinction between fitness and unfitness is recognised, there is room for debate on the matter, with reference to the whole management of which it is a part. 2*d*, The heirs have liberty to grant *feus, tacks, and rentals*, and this combination is not unmeaning or accidental. These acts of property must be presumed to refer to one general class; and as tacks and rentals belong to the ordinary course of administration, and would not be sustained as legal and fitting, if they exceeded in endurance the just bounds of ordinary management, so it must follow that the feus, permitted by the entail, are of a nature modified and controuled by the same principle. 3*d*, Liberty of feuing *sick parts and portions*, &c. is given. The mention of parts and portions indicates clearly the qualified nature of the power to feu. This expression bears an obvious reference to the partial details of which the regular and ordinary management of a great estate is composed, and is directly opposed to that total alienation of the property which had been already prohibited.

From these views it follows that the species of feus permitted by the entail must be real, onerous, and *bona fide* transactions, such as naturally arise out of the fair management of such an estate. To confer on such transactions this character, it is not enough that the technical form of them be unexceptionable; the feu must originate in the concession of mutual advantages; it must be an act of beneficial administration, and not a modification of gratuitous bounty.

II. As to the nature of the transactions challenged. If these deeds were unexceptionable in their form, and free from those peculiar circumstances and modifications by which they are vitiated, they would nevertheless be of a nature unauthorised by the entail.

1*st*, The 16 feu-rights are inseparable, and constitute one great whole. The chain of deeds, already enumerated, renders their unity indissoluble. But if it be true, as already shewn by the fairest rules of interpretation, that feus can only be granted on the principle of obvious utility in the administration of the estate, it follows that the alienation of the *dominium utile* of the whole of the estate, is in direct violation of the entail. Neither can it be maintained that such a feu can be sanctioned or justified from its fitness, by a reference to the leading or principal objects of the deed. As little does it correspond with the other criterion of relating only to parts or portions of the property. The device of dividing the transaction into sixteen parts, while it cannot ob-

tain for each a separate discussion, only exposes more distinctly the fraud of the measure. By making the feu commensurate with the extent of the property, the court is relieved both from the delicate task of assigning limits to the discretionary power, under this clause, and, at the same time, from any hesitation in determining that the present exercise of it is beyond the debatable bounds of validity.

But even the rights of superiority have not been preserved. The casualties are taxed at an illusory sum; and the feudal revenues, which would average many thousands a-year, are commuted at a few shillings. The casualties are the essentials and legal accompaniments of a feu. At the date of the entail, a vassal could not compel the superior to receive a singular successor; and it was not till the 20th Geo. II. that the general provision was made for the entry of singular successors, on payment of a year's rent. In granting the permission to feu, the entailer considered that the heir had the power of rejecting, and had therefore the choice of the singular successor. The permission must be interpreted and understood as qualified by the state of the law at the date of the entail; and there can be no question that it would have been incompetent in any heir of this entail to have executed a deed previous to the ward act, which could have deprived the subsequent heirs of this power of rejection. But that act has substituted a certain advantage in place of that right; and the Duke had as little power to dispense with the year's rent, as any former heir to have dispensed with the power of rejection. These deeds, if they could be viewed as transactions *inter vivos*, are therefore substantial alienations of the property, and as such are struck at by the prohibitions of the entail.

But, *2dly*, They cannot be viewed in this light, for they do not possess the genuine character or legal privileges of feu rights. From the system created of simultaneous deeds, each affecting and controuling the other, the whole measure assumes the form of a posthumous settlement, a destination *mortis causa*, to which the defenders have been driven after their first unsuccessful attempt to defeat the entail. The separation of the property from the superiority, and the simultaneous settlement of the former by the feu-disponee, on the same series of heirs in whose behalf the previous unsuccessful experiment of an original entail by the Duke himself had been made,—the obligation on the feu-disponee to convey to the Duke during his life the whole surplus rents,—the reserved right to exercise all the acts of property,—and the obligation to grant, when required, a liferent to the Duke of the whole property; finally, the nullity of the feus in case of the Duke's having issue,—all combine to constitute the character of a *mortis causa* settlement, and exclude the remotest resemblance to a *de presenti* conveyance. It is not a *bona fide* feu, but an indirect and most substantial infringement of the prohibitions of the entail.

To the same conclusion the delay to take infeftment directly leads. During the Duke's life, and while he was capable of enjoying the estate, infeftment was not taken. In fact the right was not completed till the Duke was *in extremis*.

If any thing could encrease the strength of the evidence, that these were not feus *in commercio de presenti* available to the defender, all doubt must

must be removed by the fact that he appears as an instrumentary witness to a lease granted by the late Duke after the alleged feus were executed.

In denying effect to this transaction, no one entitled to the favour of the law will be injured. This question does not involve the right of an onerous creditor or purchaser. The only effect will be to frustrate the hope of a gratuitous disponee, and an attempt by one heir to disappoint the rest of the series.

The practice of the ancient heirs of this estate has been referred to as containing the best explanation of the extent of the reserving clause, and reference is made to the instance of the feu of the estate of Greenhead. But that estate had been possessed by Sir Andrew Karr and his predecessors, as ancient *and native tenants, feuars, rentallers, and tacksmen*; and the contract, which is the foundation of the feudal grant, only *ratifies and approves all former feus*, &c. It was thus only a ratification of a subsisting right.

The charters of Maxwellheugh, &c. on which the defender likewise founds, were truly granted by the Earl of Roxburgh only as superior of lands which had for centuries been held in possession by cadets of the family of Cessfurd.

On the other hand, it will be noticed, that the feu of Broomlands by Earl William to Sir Alexander Don of Newton, in 1650, although sustained in this Court, was reduced in the House of Lords by an interlocutor, finding that "William, Earl of Roxburgh, had not sufficient powers "to grant the charter and conveyance. (5th March 1733.)"

Neither can any thing favourable to the defender be drawn from the feu granted to Lord Milton of a house and ground in the Canongate of Edinburgh, whether it was *ultra vires* of the granter, it is now too late to enquire from the expiry of the period of prescription. At any rate, it was a detached part of the estate, which, from the transference of the seat of the Legislature, had ceased to be a residence of the Dukes of Roxburgh, and was disposed of at an adequate price.

Finally, the case of Sir John Shaw and Lord Cathcart, 31st January 1755, establishes the principles on which this case must be decided. The clause of reservation was equally broad as in the present case; but it was decided that the power of the heir exercising the reserved faculty, although discretionary, admitted of controul by the obvious intention of the entailer.

Argument for the defender.

I. A reservation or exception from any rule, declaring that it shall not extend to a certain case, is a limitation of that rule. If the rule receive a strict interpretation (and the rule in the present case, from the indisputable acceptation of the law, is so interpreted) it follows that the limitation of the rule must receive a liberal interpretation; for a strict interpretation of the one, and a liberal interpretation of the other, are the same thing. To say that the rule must be strictly interpreted, and that the exception also must be strictly interpreted, is an obvious contradiction. Accordingly, it is an established principle that *pacta liberatoria* have liberal interpretation. It must be admitted that prohibitory clauses in entails

entails are limited by a strict interpretation; and that, in cases of this nature, indisputable intention is often defeated from imperfection or deficiency in the expression; and there is nothing in the present case to remove it from that class to which strict interpretation is applied.

It is impossible, by any commentary, to render the clauses which have been quoted more distinct. Alienations are prohibited, reserving power to grant feus without diminution of the rental; the prohibition to alienate is unlimited, but the exception is as extensive as the prohibition. By the reservation, the power to grant feus is as unlimited as the power to alienate would have been without the prohibition. The clauses are co-relative and co-extensive in their operation. The one contains a general rule, the other an exception to that rule, which, from its nature, must defeat the rule in every case which falls under the exception.

That no restriction was intended, but the single one of not diminishing the rental, is apparent from other considerations besides the literal expressions in the deed. There is no power to grant provisions to children, or remunerations to those dependants on whose allegiance the influence of so great a family naturally rested at the date of the entail. The power to feu was intended to supply this defect; and, from the nature of the object, there could be no limitation to it. It could not be meant that one heir should be enabled to provide for his kindred or pay his debts of gratitude more than another; nor is any period or limit set where the right should cease. The entailer obviously meant to trust, and has trusted, that those who might represent the family would repair, by a judicious employment of the great revenues, the dilapidations of his predecessor, and thus sustain the splendour of the house.

But if it might be exercised in this unlimited manner by the successive acts of successive heirs, it may be exercised without limit by the successive acts of the same heir; and it would be a legal absurdity to prevent a person from doing that at one act, which he may validly accomplish by successive acts. In short, by this reserved claim, the heir, so far as concerned the power of granting feus, was placed in the situation of a proprietor in fee simple.

II. To form a just decision on this point, it is necessary to examine the import of each deed. If each, separately, contains nothing to derogate from the validity of the feu rights, the combination of the whole must be equally innocent. Even regularity of form is not necessary to validate the feu rights. Missives, provided they had been such as to create an obligation as to heritage, would have sufficed; but the deeds are perfectly regular.

1*st*, The clause, that the grant shall be void provided the disponer have issue, is not inconsistent with the nature of a feudal grant,—See *Craig de Feud.* L. i. dieg. 9. § 5, 19, 28.—dieg. 10. § 2.—wherein it is clear, that, even in the purity of the feudal law, such a clause would not have vitiated the grant.—Ersk. b. ii. tit. 3. § 11. The clause indeed is just an irritancy, arising on a contingency which has never happened; and an irritancy is certainly not inconsistent with the nature of a feudal grant.

2*d*,

2d, The clause declaring the grant to be void in case the defender should establish in his person a right to the estates under the entail 18th June 1804, is exactly of the same nature, and defensible on the same principles with the former. It is a conventional irritancy on an event within the power of the disponee, and which it was optional in him to incur.

3d, The clause taxing the casualties is not inconsistent with the nature of a feu. Such an assertion is contradicted by every authority and usage of feudal law. Neither does the taxing of the casualties violate the clause, that the rental shall not be diminished. The obvious meaning of the clause is, that the feu-duties shall equal the rental from the tenants, and in fact they exceed the rental. But even if, by accident, the feu-duties should have been less than the rental, there is a clause in the grant obliging the disponee "to pay the difference between the a-"mount of the said feu-duty and the said full rental." So much with regard to the regularity of the feu dispositions.

In the contract, it is clear that there is nothing to effect the validity, though there is much to lessen the value of the feus.

The stipulations of the contract were the price of the acquisition; and even by the pursuer's argument, whatever excludes the notion of their being gratuitous must strengthen their validity in law. If, instead of these various stipulations, the defender has contracted to pay a sum of money, the constitution of the feu rights would have been still less lucrative, but not less legal.

The feu-duties, the entail, the legacies, and annuities, and the right to cut the wood, combine to constitute an onerous consideration on the part of the defender. If a variety of strangers had acquired them under these burdens, and at a diminished price, there could have been no dispute as to their validity.

It is said that, from the concatenation of simultaneous deeds, there arises a presumption that it was not the intention of the Duke really to bind himself, but merely to create a colourable title to exclude the heir of the old investiture. This is a presumption deficient in relevancy, and of which, without injury to his cause, the defender might acknowledge the truth. This is a question of power; and, if the feus have the requisites of law, the pursuers have no right to enquire into the motives of its exercise. But against this presumption the defender appeals to the deeds themselves, which are the best evidence which the law can either afford or require, and bear an instant obligation. To complete the regularity of the transaction, they were delivered to the defender at the time of their execution. This must be presumed from the fact of their having been in the defender's hands, and produced by him after the Duke's death.

Neither does the delay to take infeftment afford room for argument. In a competition of real rights, indeed, it would have been an important fact. But in a question between granter and grantee, it is of no moment. In truth, however, the plea of the pursuer on this point is inconsistent with the rest of his argument. It is said that the delay to take infeftment proceeded from fear of the Duke, who might have been induced to revoke the grants. But if these were *simulate* deeds, as is elsewhere argued, if it was a transaction vitious in its constitution, and destined to

have no force, there was clearly no necessity for this delay. The multitude of anxious and minute stipulations equally militate against the plea of simulation. To have incumbered a revocable transaction, which was not meant to be binding, with so many and various obligations, would have been unnecessary; and their introduction proves (if proof was wanting) that the parties were serious in their arrangement.

Respecting the fact, that the Duke's commissioner subscribed certain leases after the date of the feus, it might be enough to state, that this proceeded from a misconception of form on the part of the defender; and, at any rate, that they were not subscribed till his consent was obtained. The inference from this circumstance, however, that, in the contemplation of the parties, the feu rights were *simulati*, and not binding, is unwarrantable.

The extent of the plea is, that the defender homologated the act of the Duke's commissioner. To infer homologation, it is necessary that the act be such as to authorise no other supposition but that contended for, (Ersk. b. iii. tit. 3. § 48.) but a multitude of considerations present themselves to account for the act, without resorting to the most improbable of all suppositions, that the defender intended to admit away his own right.

The assertion, that the feu rights amounted to no more than a posthumous settlement, or *mortis causa* conveyance, is equally insupportable. They have not a single characteristic of such deeds,—They were delivered,—They were instantly binding,—They could not be revoked; and by them the Duke was completely denuded. Whatever modifications they might have undergone by personal obligations on the disponee otherwise constituted, it is clear that the feus cannot be classed with those deeds which, in the view of the law, are *mortis causa*. It is admitted, that provisions might have been made on children by feus under this entail. Such might have been equally termed posthumous settlements; but, having the legal requisites of a feu, they would have been sustained.

It is said, however, that these feus, from their magnitude, are alienations, and have been made with the fraudulent view of defeating the entail. The term *to defeat* is here improperly applied; and is borrowed from questions on another branch of the law of entails. This term implies, that the heir does, or attempts to do, in prejudice of the entail, that which he has no right to accomplish, *i. e.* If taking advantage of an unrecorded entail, he sells or contracts debt, or if the investitures are changed, leaving out the limitation of the entail—here the act of the heir is against law and good conscience, and he may be liable in damages to the heir's substitutes. But in the present case the heir has merely exercised the powers committed by his title. This belongs to the class of cases in which he is entitled to sell or contract debt, or alter the order of succession, either by express permission or by omitted prohibitions, and in which no wrong is in law understood to be done to the substitutes.

To attach to these transactions the legal character of prohibited alienations is equally erroneous. If they are alienations, they are such as the entail permits. In the same view, any feu, whatever be its cause or extent, is *pro tanto* an alienation; and this effect would be denied to this clause

clause altogether. The principle of law applicable to these transactions, is *majus et minus non variant speciem*. Where is the line which separates the legal from the illegal exercise of this power? The acknowledged impossibility of defining the line, proves that the power is without legal limit. It has been granted in an unlimited degree by the entailer, who was *rei suæ arbiter*. And if by it the entail is defeated, it is enough to say, that by the will of the entailer the heir has such power.

That this discretionary power should be controuled at all, has not been dictated by the entailer. That a court of justice should sit as commissioner to controul its exercise, is an arbitrary duty foreign to that of such an institution, and inconsistent with any notions of settled law.

But if it be thought that a total feu is illegal, while a partial one may be sustained, the transaction, from its nature, admits of a distinction. There are sixteen feus of which the feu-duties accord with the rent of the different parcels, and each feu stands on its own legality. The objection to the feus round the house of *Fleurs* do not apply to the rest. If the circumstance of the defender having been an instrumentary witness to the lease of Byrecleugh be fatal to the existence of that feu, this objection cannot touch the remainder.

The fact, that the deeds are of the same date, is no objection to this argument. This is a question of power; and it might have been exerted in favour of different persons and at different dates. Its exercise is as valid in favour of one as of many persons. If it has been exceeded, the excess may be corrected with more ease in the case of one than in that of numerous grantees. But if it be illegal to exercise this power to an excess, it is no less illegal to deprive the heir of power of exercising it at all.

The cases referred to as parallel, wherein long leases were reduced as alienations, have no application to the present. In the case of Turner as well as in that of the Duke of Queensberry, the granting of long leases was not permitted by the entail.—Whereas, in the present, there is a distinct and unlimited power to grant feus.

The practice of the early heirs under this entail ought not to be disregarded, and is too notorious to be denied. It appears from the charterlay of the family, that, both before and after the entail, many estates of immense value have been at different times feued out by the different heirs.

By the decision in the Greenock case, a principle of interpretation was established very favourable to the defender. The clause permitting to feu was not so extensive and unqualified as the present; but feus of the greater part of the estate were sustained, with the exception of one, which was reduced on a speciality. In the particular circumstances of the case, it was thought that a feu of the family mansion-house, garden, and policy, could not be sustained. But none of the feus in the present case are of that description, 31st January 1755, Stewart Nicolson Schaw against Lord Cathcart, Fac. Coll.

Three opinions were entertained on the Bench.

1*st*, Several of the Judges adopting the general argument of the defenders, as already detailed, were for sustaining the feus *in toto*.

2*d*,

2d, A majority of the Judges, proceeding on the argument maintained for the pursuers, were for sustaining the reasons of reduction; they considered the sixteen feu-dispositions, modified by the contract and deed of entail, as one indivisible transaction, which was reducible on two grounds: 1*st*, Because it was vitiated by the palpable characters of a posthumous settlement, and was in substance a *mortis causa* deed. The operation of the feu-rights had been suspended during the Duke's life; and, whether delivered or not, they had remained entirely in his power. They were not, therefore, feus *in commercio* instantly available to the disponee, and such as the entail warranted, but were trust-feus executed as a cover to accomplish other purposes. *2dly*, Because from their magnitude, they were an unwarrantable exercise of the reserved faculty. But as these opinions rested on the whole of the pursuer's argument, a detail of them would be nothing more than a repetition of what has been already stated.

3dly, One of the Judges delivered a third opinion. He held it clear, that here an ample power of feuing was conferred by the entail; so ample and so unguarded by qualifications or conditions, that without exceeding the verbal limits of it, or violating any of the known rules of law as to creating feus, the exercise of it now under consideration might be maintained in case this power was to be exercised by the same rules as powers of alienation,—contracting debt,—altering the order of succession, and the like, whether expressly conferred, or resulting from the imperfection of fetters. But he thought himself warranted under the authority of the case of Greenock, decided in the times of President Craigie and the Earl of Hardwicke, to hold that the power here granted, was a power of administration of the estate only; and, however ample, was to be exercised by the heir in possession, *tanquam vir bonus*; and if exercised otherwise, and to the destruction of the estate, or in a manner grossly exorbitant, courts of justice would interpose to afford redress. At the date of the entail, feuing was an ordinary act of administration for obtaining the profits of an estate, for rewarding the services, and confirming the attachment of retainers, and even for providing the cadets of the family of the proprietor. In short, it was a principal instrument for sustaining the revenue, and the strength and the splendour of a great family. And while the entail in question reserved no particular faculties for providing wives or younger children, it allowed of feuing generally, which, as the law then stood, it never could enter into the imagination of any person, could have been employed for supplanting the representative of the family, and conferring the whole estate on a favourite, under a character so inferior and dependant as that of feuar then, *in forma verborum*, was. And here the power granted, though without restriction, except the discretion of the heirs, is plainly bestowed as in a matter of ordinary administration, "Reserving to our said heirs to grant feus, tacks, and rentals, "of such parts and portions of the said estate as they shall think fitting," and not in diminution of the rental at the time. Now, in the entail of Greenock, executed half a century afterwards, the reservation to the heirs is, to "grant feus or long tacks for such spaces as they shall think fit, of "any part or portion of the said lands, the feu or tack-duty not being "under 20s. Scots for each fall of dwelling-houses, and 5s. for the fall

"of

" of yards and office-houses." But this power obviously also in a matter of administration, though also without any restriction in words as to the parts and portions of the estate to be feued, except the mere discretion of the heirs, was held in the middle of the last century as insufficient to warrant either a feu of a barony forming nearly half the estate, or the feu of those acres adjacent to the mansion-house and gardens, though with an increase of rental. And, at the same time, under this power, a feu of nineteen acres, convenient for the extension of the town of Greenock, was sustained, though obviously conferred at a great under value on the daughter and heir-of-line of the granter, otherwise very well endowed. He considered that on the authority of this decision much property may have been arranged: And though he saw the controul, which it sanctioned, could hardly be exercised according to precise and definite rules, he did not think himself at liberty to depart from it, founded, as it appeared to be, on a general and just principle: That with respect to powers of management and administration, the will of the entailer was to be observed; and that a power granted for the comfort and advantage of the *familia predilecta*, was not to be perverted to its destruction, or for the conversion of a princely estate entailed upon it into a mere annuity. He observed that destruction was not too strong a word; for as the law now stood, the feuar, if the feus were sustained, might purchase the entailed superiority at 18 or 19 years purchase; and the lands acquired with the price, at 28 or 30 years purchase, might be again feued, and the superiority again sold, till, by the mere operation of conveyancing, nothing was left for the heir of entail. On these grounds, he was against either sustaining or cutting down the feus generally; but being of opinion that Duke William was entitled to make a liberal and ample provision for the defender in the situation in which he stood, by a reasonable exercise of the power of feuing, and that the method followed of making separate feus, enabled the Courts to sustain what was adequate for this purpose, while they reduced what was exorbitant, and *in fraudem* of the entail; he concluded that the parties should be heard upon this matter, as to which there had as yet been no discussion.

A great majority of the Court, however, concurred in pronouncing the following interlocutor: " *12th January* 1808.—Find that the late Duke " of Roxburgh held the estate of the Dukedom of Roxburgh under the " fetters of a strict entail: Find that the deeds now challenged were not " granted in the due exercise of the reserved powers in that entail, of " granting feus, tacks, and rentals, and therefore sustain the reasons of " reduction thereof, and of the sasines thereon; reserving all objections " to the title of the pursuers, and to them their answers as accords."

Lord Ordinary, Alt. *John Clerk.* *Alex. Goldie*, W. S.

Act. *Robt. Craigie, Thomas Thomson* et *Ad. Gillies.* Agents, *James Horne*, W. S. *Hotchkis* and *Tytler*, W. S. and *Buchanan*, Clerk.

J. W.

No. XXIII. *January* 14. 1808.

ATKINSON, MURE, and BOGLE,

AGAINST

LEARMONTH and LINDSAY.

CONFIRMATION.—1st, *Arrestment used in the hands of the nearest in kin, before confirmation, is inept.*

2d, *In a competition between an arrestment in the hands of the nearest in kin, partially confirmed, and a confirmation as executor creditor*, ad omissa, *the former attaches no more than the fund specially confirmed, and the latter is the only valid diligence by which the remainder can be attached.*

ARCHIBALD HAMILTON, residing in St Domingo, was indebted to Atkinson, Mure, and Bogle, to the amount of L.4919 Sterling, and was likewise indebted to Learmonth and Lindsay to the amount of L.1567 Sterling. Hamilton remitted money to John Miller in Glasgow, to the amount of L.5717 Sterling, by whom it was placed in the branch of the Royal Bank of Scotland there. John Miller shortly afterwards died; and George his brother acted as his executor.

In the year 1799, Hamilton died abroad, and left a will, wherein he appointed certain executors, of whom several resided abroad, and all ultimately declined to accept or act.

To secure this fund the parties proceeded in the following manner:

Learmonth and Lindsay, on the 25th July and 12th December 1799, executed an arrestment to found jurisdiction; and having raised an action of constitution before the Admiralty Court, against the testamentary executors of Hamilton, and against Mrs Mary Hamilton his sister and nearest in kin, arrested the fund *in medio* on the 27th March and 4th July 1800. At this time Mrs Mary Hamilton had not made up any title by confirmation; and having renounced, she was assoilzied from the action of constitution. Learmonth and Lindsay, however, raised a reduction of this decree, and obtained a decree of reduction, constitution, and payment against her on 25th July 1803.

Atkinson, Mure, and Bogle, on the 29th and 30th December 1801, executed an arrestment to found jurisdiction; and having raised a process of constitution against the testamentary executors, and Mrs Mary Hamilton, arrested the fund *in medio* on the 4th and 5th January 1802, while it lay in the branch of the Bank, Glasgow; and on the 13th and 17th January 1803 after, it was removed to the Bank of Scotland in Edinburgh.

On the 9th March 1801, Mrs Mary Hamilton, as nearest in kin to Archibald Hamilton, expede a partial confirmation to the extent of L.100 Sterling. Farther, Atkinson, Mure, and Bogle expede a confirmation *quoad omissa*, as executor creditor to Hamilton, on the 8th February 1803, on discovering that the confirmation expede by Mrs Hamilton was

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a partial one. On the 11th February 1802, George Miller had raised a process of multiplepoinding, in the course of which the above interests were produced.

Atkinson, Mure, and Bogle objected to the diligences produced by Learmonth and Lindsay, 1*st*, That their arrestments being laid prior to the date of Mrs Mary Hamilton's title as executor by confirmation, were inept. 2*d*, That even if the arrestments had been effectual, yet as Mrs Mary Hamilton had only expede a partial confirmation to the extent of L.100 Sterling, the arrestments could only attach to that amount; and therefore the confirmation as executor creditor *quoad omissa*, was the regular and preferable diligence. 27th July 1779, Sloan Laurie against Spalding Gordon.

The Lord Ordinary pronounced the following interlocutor: " Finds " that the arrestments used by Messrs Learmonth and Lindsay, although " prior in date to those used by Atkinson, Mure, and Bogle, cannot give " them any preference, or be of any avail, in respect the same were used " before the time that Mrs Mary Hamilton had by confirmation vested " any proper right to herself in the funds in question; and that therefore " the arrestments used by Atkinson, Mure, and Bogle being used poste- " rior to Mrs Mary Hamilton's confirmation, are to be held preferable to " the others: Finds, however, that as Mrs Mary Hamilton did not ex- " pede a general confirmation, but only the confirmation of a particular " fund to the extent of L.100; so the arrestments used against her can- " not give the users of such diligence any right to a greater sum further " than to the amount of the L.100 specially confirmed: Finds that " with regard to the remainder of the funds not confirmed by her, " they remained *in bonis* of Archibald Hamilton the defunct, till taken " up in a habile manner; and finds that this was done accordingly, " by the confirmation of Atkinson, Mure, and Bogle, as executors cre- " ditors *ad omissa*, whereby they vested in themselves a right to the said " funds, and in consideration of which they have by that diligence a " preferable right to the other competing creditors, who neglected to use " that diligence in proper time."

The Lord Ordinary afterwards reported the case to the Court on memorials, and the Lords adhered, (14th January 1808.)

In deciding the question between these parties, it was unnecessary for the Court to do more than to adhere to that part of the Lord Ordinary's interlocutor, which finds, " That the arrestments used by Learmonth and " Lindsay, although prior in date to those used by Messrs Atkinson, " Mure, and Bogle, cannot give them any preference, or be of any avail, " in respect the same were used before the time that Mrs Mary Hamil- " ton had by confirmation vested any proper right to herself in the funds " in question; and that therefore the arrestments of Atkinson, Mure, and " Bogle, being posterior to Mrs Mary Hamilton's confirmation, are to be " held preferable to the others;" because the arrestments of Learmonth and Lindsay being in this respect inept and null, there was no longer any party having an interest to agitate the second and important point of law laid down in the last finding of the Lord Ordinary's interlocutor.

But

But it is proper to notice historically, that the Court were no less clear with respect to that part of the interlocutor. They considered that, in a competition, confirmation as executor creditor *ad omissa* was the only proper and regular diligence to attach the fund *in medio*, where the nearest in kin had only expede a partial confirmation; and that this question had been well and solemnly decided in the case, 27th July 1779, Sloane Laurie against Spalding Gordon, quoted in support of the pursuer's argument.

Lord Ordinary, *Cullen*. Act. *J. W. Murray*. Alt. *W. Boswell*.
Tod & Romanes, *Alex. Boswell*, and *Robinson & Ainslie*, Agents.
M. Clerk.

J. W.

No. XXIV. *January* 19. 1808.

ROBERT CRAIGIE AND JAMES HORNE, Trustees of Sir JAMES NORCLIFFE INNES KER,

AGAINST

SIR JAMES NORCLIFFE INNES KER, and against GENERAL WALTER KER, and JOHN BELLENDEN KER.

APPEAL.—ADJUDICATION.—TAILZIE.—*An alledged heir may, for the purpose of making up a title, grant a bond to trustees, and, on that bond, they may charge him to enter, adjudge the estate, and convey the adjudication to him,*—1. *Though the same alledged heir has already attempted to serve, and his service has been suspended by the effect of an appeal to the House of Lords,*—2. *Though the right of the truster to the estate be disputed* in toto, *and be under trial in the House of Lords,*—3. *Though he be heir of a strict entail.*

THE report of the case Sir James Norcliffe, &c. 23d June 1807, No. cclxxxvi of the last volume of this Collection, must be read as the narrative of this case.

Sir James Norcliffe Innes having obtained the last interlocutor mentioned in that report, which is there dated the 7th July 1807, on the day following attempted to complete his service. But Bellenden Ker appeared in it, and objected, that he had already intimated a petition of appeal to the House of Lords, against the interlocutor 13th January 1807, and the interlocutor 23d June 1807, adhering to it: that therefore the service being suspended by the interlocutor of the macers, 17th February 1806, till a direction on the point of law should be

be obtained from the Court of Session, avizandum being made to the Court, with the case, for this purpose; the case then being carried from the Court of Session to the House of Lords by appeal against the interlocutor pronounced on that report, and that appeal being in dependence, so that no direction could be obtained, it was impossible for the service to proceed. The question arising on this objection was reported by one of the Lords, assessors to the Court, which on that report pronounced this interlocutor, 10th July 1807,—"In respect of the said appeal, remit to "the macers, with this instruction, that they suspend, *in hoc statu*, fur- "ther proceedings in the said service."

Soon after it was pronounced, General Ker intimated to Sir James Norcliffe Innes a petition of appeal to the House of Lords, at his instance, against the interlocutor 7th July 1807.

Sir James, aware that it might be out of his power to make up a title to the estate by service, without much delay, had already determined to do it in another way, to wit, by adjudication on a trust bond. For this purpose he granted, 14th March 1807, to Robert Craigie and James Horne, a bond for L.1,500,000 Sterling. Upon this bond they charged him to enter heir in general and in special to the late Duke of Roxburgh and his predecessor Duke John, in the estate of Roxburgh; and on the expiration of the days of charge, they raised a summons against him for adjudication of this estate in payment of the above sum. The Lord Ordinary ordered intimation of the process to be made in the Minute-Book, and on the walls, in ordinary form *.

General Ker and Bellenden Ker then came forward as defenders in the process of adjudication, by representations against this interlocutor. After some procedure, the Lord Ordinary reported the case, on minutes and answers. The Court appointed a hearing in presence. On hearing counsel, the interlocutor of the Court was,—15th Dec. 1807, "Remit to "the Lord Ordinary to repel the objections, to call the case without an "hour, and to decern in the adjudication." The Lord Ordinary accordingly called the cause the same day, and his interlocutor was,—"Repels "the objections, refuses the representations for Brigadier-General Ker "and his attorney, and for John Bellenden Ker; and adjudges, de- "cerns, and declares in terms of the libel."

Against this interlocutor General Ker reclaimed, and his petition was answered.

Argument for General Ker.

I. The present action, according to the account given of it by the pursuers, is intended to make up titles to the estate of Roxburgh, in the person of Sir James Norcliffe Innes.

But the very same thing was the object of the service; and the interlocutor, 7th July 1807, found that Sir James was entitled to succeed in it. This interlocutor is now under appeal; and, accordingly, it seems

* The Court afterwards expressed an opinion, that this form was superfluous in this case.

clear that, even if the service were not suspended by the appeal at the instance of Bellenden Ker, it could not proceed now till this appeal at the instance of General Ker were determined. But as little can Sir James Norcliffe Innes make up a title by another form, while these interlocutors are under appeal. The order of the House of Lords, 19th April 1709, prohibits a sentence or decree appealed against from being carried into execution, "by any process whatever." But if Sir James Norcliffe Innes makes up a title by adjudication, he just carries into execution, by a different process, that interlocutor which finds him entitled to make up a title by service.

II. Supposing the order of the House of Lords out of the question, this adjudication cannot proceed, because the right of Sir James Norcliffe Innes the truster, as heir, is *sub judice*. No instance can be produced of an adjudication of this sort being attempted in such a situation. The acts of Parliament 1540, ch. 106. and 1621, ch. 27.—Act of Sederunt, 28th Feb. 1662,—and act of Parliament 1695, ch. 24. all speak of heritors or heirs apparent as the persons who may be charged to enter,—evidently regarding them as persons whose right to enter was clear. In the same way, Bankton, b. iii. tit. 5. § 101. and Stair, b. iii. tit. 5. § 23. speak of this form as equivalent to service, and of course requiring a similar right in the heir. In short, the person who is charged to enter is presumed to have served. But how can a person be charged to enter, and held to have served, who cannot serve, because his right as heir is *sub judice*. If it be said that he is not presumed to have served, then he is at least presumed to have wrongously refused to serve; but neither is there any room for this presumption.

The case of Beveridge against Coutts and Crawford, 10th July 1793, was decided on the ground, that the heir making up a title by adjudication was entitled to have served,—see observation on Bench in that case. Indeed, if persons notoriously destitute of right to serve were entitled to make up a title by adjudication, then any body who pleases, even a perfect stranger, may make up such a title. But the contrary was found, Gordon against Forbes, 7th February 1699, *Fountainhall*,—and the case Dow against Don, 28th Nov. 1712, *Forbes*, was decided on a similar principle. No person can be more notoriously destitute of a right to serve than Sir James Norcliffe Innes is at present, since his service is stopt by a final interlocutor, on a ground since rendered much stronger.

III. Supposing the order of the House of Lords out of the question, and that Sir James Norcliffe Innes was undoubted heir, yet as this estate is entailed, General Ker, who is at least a subsequent heir of entail, has a right to prevent a trust-adjudication of it, since the clauses of entail render this mode of making up a title inapplicable to an entailed estate. It is impossible to adjudge such an estate, because, by these clauses sanctioned by statute, all contractions of debt on which it may be adjudged are prohibited, voided, and made grounds of forfeiture. The right arising from these clauses is in the heirs of entail subsequent to the heir having right to possession; and whenever, upon a debt contracted, an adjudication is attempted, any one of these subsequent heirs of entail may prevent it, by insisting, in terms of these clauses, that the contraction

tion of debt is void in relation to the entailed estate, and that no adjudication of that estate can proceed upon it. The right of the subsequent heirs of entail to maintain the clauses of the entail, is notorious, and was lately sustained in the case of Turner against Turner, 17th Nov. 1808, where they were found entitled to set aside a lease granted in contravention of the entail. There is no exception in the entailing clauses in favour of adjudications intended for any particular purpose. There is no room, therefore, for that fiction of law on which this mode of making up a title depends, viz. that the trustee is a creditor of the heir and has adjudged the estate; for no creditor of the heir can adjudge the estate.

Nor can it be said with truth, that the subsequent heirs of entail have no interest to oppose such an adjudication; for the adjudication must be just like any other adjudication, otherwise it would have no effect by the act 1540 or 1621. These acts never authorised heirs to charge themselves, and to adjudge in their own persons, the estates of their predecessors. If, therefore, the pursuer of the adjudication were, *ex facie* of the bond and summons, a mere trustee for the heir, the process would be inept. He must, *ex facie* of the bond and summons, be a real creditor. Whether backbonds exist or not is nothing to the subsequent heirs of entail, since these must be wholly in the power of the first heir, who may discharge them when he pleases by a secret deed.

In this situation the subsequent heirs of entail have just the same interest to oppose the adjudication that they ever can have to oppose any adjudication, with this only difference, that they have an assurance from the first heir of entail and his trustees, that neither of these parties will make any use of it, except for giving a title to the heir. But this still leaves it in their power to use the adjudication as an ordinary one, and to prevent the risk of an evil is equally a legal interest, whether that risk be greater or smaller. The subsequent heirs of entail are nowise obliged to relinquish the absolute security arising from the entail, and betake themselves to a reliance on the good faith of the truster and his trustees.

But, besides these objections to the form and procedure in this adjudication, the necessary and ultimate effect of it, if completed, must be contrary to the entail. For the entail provides, that there shall be a regular transmission of the proper fee of this estate to a certain order of substitutes without interruption. But by this operation a new right must be created different from the original fee, and that must be transmitted through the persons of Messrs Craigie and Horne, who were not in the line of the entail. It is obvious that the adjudication must create a new right, not merely transmit the fee, for the right under it is not an absolute right at all, but redeemable on payment of a certain sum, which a change in the value of money might bring below the value of the estate. Accordingly this point was distinctly recognized in the case of Hepburn against Scott, 25th July 1781. See observations on the bench in that case. In the case of a fee simple, the change of right is of no moment, but in the case of an entailed estate it cannot be admitted without violating the entail. Indeed, if the entailing clauses be inserted in the conveyances of this new right to Sir James Norcliffe Innes,

Innes, this will create a new entail altogether, requiring new registration, and exposing the estate to be carried off while it is unregistered. Such being the effect of this operation, supposing it *bona fide* carried through a subsequent heir of entail, is entitled to object to it on this ground.

Lastly, No instance can be produced in which this form was ever applied to an entailed estate.

Argument for Messrs Craigie and Horne.

I. The present process is not at all calculated to carry into execution any decree appealed from. The interlocutors in question related solely to the service, and found that the service might proceed. They are carried to appeal, and it does not proceed; so that there is no pretence for saying that they are carried into execution. Even though the interlocutors in the service had been against Sir James Norcliffe Innes, it would not have prevented him from making up a title by another form, to which there was no objection. An appeal, or a decree against a claimant in a competition of creditors who used one form of diligence to which there is objection, would not prevent him from using another form to which there is no objection. Massey against Smith, 12th July 1785. And a competition of rights of succession is just in a similar situation.

II. This process of trust-adjudication, so far from requiring a clear and undisputed right in the person using it, is the ordinary form of making up a title in doubtful cases. It is a mode by which the alleged heir merely vests in himself the right he truly is entitled to, whatever it may be, leaving the nature of it to be cleared by future discussion, and in which he absolutely avoids all interference with the claims of other people. If it turns out that they have a preferable claim to his, this process goes for nothing, and can do no harm to any body. If his right turns out preferable, he has the advantage of having made up a title without being prevented by a claim which turns out to have been ill founded. The power of doing this arises from the nature of an adjudication, in which decree is always granted *periculo petentis*. See Stair, b. iii. tit. 2. § 47. Dictionary, vol. i. p. 3. Adjudication.

An ordinary adjudication, in short, transfers to the creditor whatever right the debtor has in him, and no more; and in the same way an adjudication, on a charge to enter heir, conveys to the creditor whatever right the debtor is truly entitled to enter to, and no more. A trust-adjudication, on a charge to enter, is in the same situation as any other adjudication on a charge, and therefore can convey to the trustee, and ultimately to the truster, no more than he is really entitled to. When the decree of adjudication is obtained, and when a claim of possession is made, then, and not till then, the rights of third parties come into question. The only objection to giving decree in this process, if any can be admitted, must be, as in other adjudications, the production of an unquestionable title instantly verifyed.

This view of a trust-adjudication has uniformly been adopted in our law. It is quite a mistake to say, that it is founded on a presumption

of

of service having taken place, it is founded on the very reverse. See Statutes 1540 and 1621. The effects of it are similar to service in giving an active title, but that title is merely tentative, and it does not become a passive title till followed by possession, so that it is safe and innocent as to all parties concerned. In practice it has on that account been resorted to for a long time back as the ordinary title for trying questions of disputed succession, but it never was identified with service, which is a complete title at once. Nothing to that effect is to be found in the act of sederunt 1661, nor in the act of parliament 1695, which recognise this form; and the view that has been given is clearly adopted by Bankton, b. 3. tit. 5. § 101.—Erskine, b. 3. tit. 8. § 72. —and in the decisions Hepburn against Scott, 25th July 1781, and Beveridge against Crawford and Coutts, *supra*. The observation on the bench, in this last case, did not call in question the general doctrine, in which the judge who made that observation (Lord Braxfield) concurred with the rest of the judges.

The decision, Gordon against Forbes, in Fountainhall, at the utmost, only shews that some evidence of the predecessors connection with the lands might be required, where there was no notoriety of it; but here there is full notoriety of that fact, which is admitted on all hands. At any rate this single old decision is of no great authority.

In this case, therefore, the adjudication must proceed, since no unquestionable title to the estate of Roxburgh instantly verified is produced for any objector.

III. General Ker has not yet established either that there is an entail which operates beyond the succession of Sir James Norcliffe Innes, nor that he is himself an heir of entail. But taking these things for granted, the entail cannot prevent the trust-adjudication. For the entail never was intended to prohibit adjudications in trust for making up titles under it. The adjudications it prohibits are adjudications "fra the heirs of entail;" so that even the strict words of it do not apply to trust adjudications.

It would, in many cases, be of great detriment to heirs of entail to be excluded from this mode of making up titles; and it would be a most irrational interpretation of the entail to extend the prohibition against a useful mode of carrying its own provisions into execution.

Even if it had, *ex figura verborum*, prohibited all adjudications, there would have been room for a reasonable interpretation. A similar interpretation has been adopted in the case of dispositions, which are generally prohibited *ex figura verborum*, and which are yet found not contrary to the entail when granted to the next heir of entail.

All ideas of danger resulting from this form are erroneous. The adjudication, till infeftment is taken on it, is essentially qualified by the backbond, (see Erskine, passage following that quoted by General Ker) and a conveyance of it from the trustees to Sir James Norcliffe Innes is ready to be signed the moment it is obtained, so that all danger from breach of trust on their part is out of the question. But in all events, their right is essentially qualified by the conditions of the entail, which affect the right of succession in Sir James himself, from whom their right is derived; so that it is utterly impossible for them to make any use of it that is contrary to the entail. It is equally so for Sir

James Norcliffe Innes himself, when the adjudication is conveyed to him. If it is said he may take infeftment without inserting the conditions of the entail, and affect the estate by act 1617, so he might upon a special service with just equal facility; but that is prevented by the certainty of losing both the estate and all the advantage of affecting it, if such a thing should be attempted. In this case there is an additional security; for the conditions of the entail are to be contained in the conveyance of the adjudication to Sir James Norcliffe Innes, which they need not be in the retour on a special service.—See Kames, Vol. I. No. 79;—Stewart against Denholm, 1st February 1726.

The objections to the effect of the title by trust-adjudication, when completed, seem frivolous. The names of the trustees will not be introduced into the line of succession; they will appear merely as instruments in the investiture of one of the heirs of entail, which can do no harm. Nor will any new right be created, or new entail made, but the old right under the old entail transmitted. The power of redemption is of no moment; the sum is amply sufficient to prevent redemption; and, besides, this power is in the heir himself, and can no more invalidate his title than the want of a truly onerous consideration, for the trust-bond can invalidate it. But such objections might equally be made to all trust-adjudications, and are wholly excluded by our settled practice.

The case of Noble against Dewar is one instance of a trust-adjudication of an entailed estate. The true ground of decision in that case was, that a trust-adjudication was not prohibited by the entail *. But at any rate the thing was done.

The majority of the Court adopted the arguments of the pursuers; and several Judges particularly expressed their opinion, that the adjudication must pass *periculo petentis*, and could be of no prejudice whatever to the other claimants of the estate, or the heirs of entail, since it could not possibly do more than supply the want of the maxim *mortuus sasit vivum*, and transmit to Sir James his right to the estate such as it truly was, and would turn out to be, when the truth should be discovered by the judgment of the House of Lords, provided he had any right at all; and that, if he truly had no right, this adjudication would go for nothing.

That even if Sir James Norcliffe Innes should take charter and sasine on the adjudication, that could make no difference. His title would still be of the same qualified nature, *i. e.* a mere tentative title; and this qualification would affect all conveyances he could make to third parties in any form whatever.

The minority adopted the arguments of General Ker.

The Court, by a majority of nine to six, adhered to the interlocutor of the Lord Ordinary.

A reclaiming petition was afterwards presented for Bellenden Ker, who reiterated the arguments that had been used for General Ker; and particularly insisted upon the inconsistency of allowing Sir James Norcliffe Innes to make up a title in this way, without any determination as to the points of right that had been carried to appeal, when it had been found, and was a final interlocutor in the Court of Session, (10th July

* President Craigie's Notes were referred to as shewing this.

July 1807,) that he could not do it by service till these points were determined. He maintained that there was no conceivable consequence of allowing the one, that would not also arise from allowing the other.

The Court refused the petition without answers.

Lord Ordinary, *Glenlee.* Act. *Dean* et *Craigie.* Alt. *Clerk* et *Gillies.* *Ja. Horne*, W. S. *Hotchkis & Tytler*, W. S. and *Alex. Goldie*, W. S. Agents. *Walker*, Clerk.

M.

No. XXV. *January 26.* 1808.

TOPHAM, DAVIES, and MISSES JARRATS, and JOHN WHITE, their Mandatory,

AGAINST

THOMAS HAY MARSHALL.

INHIBITION.—*An inhibition executed and published at the market-cross of the head burgh where the person inhibited resides, is effectual against foreigners.*

ON the 2d June 1796, Mr Thomas Hay Marshall raised letters of inhibition against Mrs Rose Anderson, his wife, which were duly published, and executed against her on the 22d of the same month at the market-cross of Perth, the head burgh of the sheriffdom within which she then, and for many years before and after, resided. Previous to this date, a process of divorce had depended between these parties; an aliment of L.100 Sterling had been modified to Mrs Rose Anderson, and she had lived in a state of separation from her husband, but the marriage was not dissolved by sentence of divorce till the year 1804. Thus separated from and inhibited by the defender, Mrs Rose Anderson incurred with the pursuers, who were hatters in London, an account amounting to L.30. 8s. 6d. commencing in February 1799, terminating in October 1800, and contracted when she resided in London.

Mrs Rose Anderson, while living in family with the defender, had been in the custom of employing the pursuers in their line of business.

The defender declined to pay this account; and the pursuers raised an action concluding against him for payment of it.

The cause was discussed before Lord Meadowbank, Ordinary, who called upon the defender to prove, 1*st*, That intimation of the inhibition and separate aliment of his wife had been made to the pursuers; or, 2*dly*, That the account was extravagant. But neither of these points could be established.

The

The Lord Ordinary pronounced the following interlocutor, 15th February 1805: " In respect the inhibition used by the defender was not " executed so as to operate against persons forth of the kingdom, and " that no proof is offered of special notice having been given to the pur- " suers not to trust Mrs Marshall, and that the charge of extravagance in " these articles furnished does not appear to the Ordinary well founded, " —Decerns against the defender for the amount of the account libelled, " finds expences due, and allows an account therefor to be put in; and " dispenses with any representation."

The case came before the Court by petition and answers.

Argument for the defender.

The inhibition was regularly published and executed according to the forms prescribed by the law of Scotland. These forms are regulated entirely by the situation of the inhibited person, and not by the situation of those with whom such person may possibly contract, and who therefore may eventually be affected by the diligence. If the diligence be regularly executed against the person inhibited, it must be effectual against the whole world. The form of inhibition against a wife is the same with that against any other person; so likewise must be the effect. The act of Parliament (1597, ch. 268.) which dictates the form of executing inhibition, makes no distinction in this respect; and therein no regard is had but to the situation of the person inhibited. To have executed and published at the market-cross of Edinburgh, pier and shore of Leith, an inhibition against a person residing in Perth, would have been absurd; and, at any rate, would not have more effectually warned foreigners. The maxim of law, " *Quicunque debet scire conditionem ejus cum quo contrahit*, is of general application, but more particularly regards those cases wherein parties contract with married women. The slightest enquiry would have satisfied the pursuers that Mrs Rose Anderson lived apart from her husband, was inhibited by him, and had a separate aliment. The law applicable to this case is accurately stated in an early decision (6th July 1677, Allan against the Earl and Countess of Southesk, *Stair*.) On the supposition that an inhibition duly executed and published, according to Scotch forms, is insufficient, there would be no other remedy but to follow the party inhibited wherever caprice might lead him, and there to take the steps dictated by the peculiar laws of his casual residence; such a proceeding, it is believed, is not required by the jurisprudence of any independent state where law is a science.

Argument for the pursuers.

I. Inhibition is directed not only against the party who is the object of it, but also the lieges in general. In the present case, Mrs Rose Anderson is inhibited from delapidating her husband's effects; but, secondly, the lieges in general are inhibited from dealing with her to her husband's prejudice; and it is by the prohibition against themselves only that they are barred. The execution and publication at the market-cross of Perth might be sufficient against the Scotch lieges; but to render the diligence effectual

effectual against foreigners, that publication, at least, ought to have been made, which the law requires as equivalent to intimation against natives being without the territory of Scotland. This kind of diligence is subjected to the utmost strictness of interpretation; because, whatever the presumption of law may be, it is necessarily unknown to many who, *optima fide*, may contract with the person against whom it is used.—26th Feb. 1695, Fountainhall, vol. i. p. 673. Watson against Baird.—2d Dec. 1748, Kilkerran, Inhibition, No. 10.

But, farther, the diligence of inhibition can have no operation beyond the territory of Scotland. Thus, as an inhibition directed against a person in Scotland to prevent the alienation of his heritage, could not prevent him from disposing of an estate situated in England; on the same ground, an inhibition executed for the purpose of preventing the disposal of personal effects, and the contraction of personal debts, ought to have no effect in a foreign territory. No diligence, writ, or decree, is effectual, unless it is executed according to the forms of the country within which it is to have operation. Voet, b. 42. tit. I. § 39. See likewise b. 23. tit. 2. § 60.

II. During the subsistence of the marriage, and while the parties lived together, the pursuers had been employed by Mrs Anderson. To their accounts the defender had never objected, and they had been regularly paid. The defender was therefore bound to have intimated to them his altered situation, and that he no longer was liable for his wife's debt. Besides, at the date of this account, the marriage was not dissolved; and Mrs Anderson was entitled to contract such debts as were necessary and suitable to her situation. Grant against Sir William Jardine, 23d June 1796.

The Court differed in opinion from the Lord Ordinary.

It was observed, that every one is bound to enquire and satisfy himself with regard to the condition of the person with whom he contracts; and if he fails in this, he must suffer the penalty of his own credulity. The party with whom the pursuer contracted was a native of Scotland, and her *status* was determined by the laws of that country. In the execution and publication of the diligence of inhibition, regard is only had to the domicile of the person who is the object of it; and in the present case, the diligence, being regular according to the law of Scotland, must be effectual against all mankind.

The following interlocutor was pronounced (11th Dec. 1807.)

" Find the inhibition a valid and subsisting diligence; and therefore " alter the interlocutor reclaimed against, and assoilzie the defender from " the conclusions of the libel."

And on advising a petition, without answers, the Lords adhered, 26th January 1808.

Lord Ordinary, *Meadowbank*. Act. *Ja. Fergusson*. Alt. *Adam Gillies*.
John Whyte and *James Fraser*, W. S. Agents. *W.* Clerk.

J. W.

No. XXVI. *January* 26. 1808.

ALEXANDER CRAIG, Deacon, and JOHN ARMOUR, sen. Collector of the Corporation of Tailors in Glasgow,

AGAINST

ROBERT FORRESTER Merchant in Glasgow.

BURGH ROYAL.—EXCLUSIVE PRIVILEGE.—*A person, not free of the Tailor craft, may sell, in a shop within burgh, clothes made by freemen tailors, and may take commissions to get clothes so made.*

THE Incorporation of Tailors in Glasgow have, by charters, an exclusive privilege of "brucking and using the liberty of their craft "within that town." Robert Forrester, who was not a freeman of that craft, set up in the town what is called a slop shop, or man mercers shop, at which he sold cloathes ready made, and cloth, which he also, if required by his customers, got made up into cloathes, and delivered in that state, receiving the price both of the cloth and making. All these cloathes were made within the burgh, by freemen tailors, whom Forrester employed for that purpose.

The Incorporation of Tailors brought an action against him before the Magistrates of Glasgow, to have him prohibited from doing this. Forrester admitted these facts; and as the pursuers did not chuse to undertake a proof of any others, the Magistrates on the above case *assoilzied the defender.*

The cause was carried to the Court of Session by advocation. The Lord Ordinary reported it on informations, (6th Dec. 1807.)

Argument for pursuers.

The practice of this defender puts into the hands of a person, who is not a freeman, a part of the tailor craft, to wit, the *furnishing of customers.* It converts the freemen tailors into mere journeymen under him. They are paid indeed by the piece; but that makes no difference. All the stock is his; all the customers are his. He receives the commissions for cloathes, and the price of making them, and pays over to the workmen he employs a smaller sum, which is just wages. It will be observed, that, by this practice, these workmen of the defender, being freemen, may have unfree journeymen under them, i. e. nominally so, but in truth under Forrester, who thus only pays one workman by the hands of another; so that, by having a few freemen under him, he may keep as great a number of unfree journeymen as he pleases; and all this within burgh. In short, he is to all intents and purposes a master tailor of

of Glasgow; and if this is allowed there will soon be no others in that town.

This is not only an encroachment on the privilege of the incorporated craft, but it is supported entirely by inducing the members of the incorporation to violate their duty and their corporation oath, which binds them not to pack or peel with unfreemen; and in this particular case, by its express words, the oath binds them, "that they shall not anywise "be concerned, directly or indirectly, with any person whomsoever, "in any branch or part of the trade, until he be first entered and ad- "mitted a freeman thereof." These freemen, most assuredly, who enable Forrester to take the full capacity of a master tailor, do violate this oath.

The defender cannot, therefore, be allowed to carry on business, by violating the privilege of the pursuers himself, and by inciting others to a breach of faith.

The doctrine here pleaded was sanctioned by the Court in the case of the Corporation of Hammermen of Glasgow against Dunlop, 18th Feb. 1757, and that of the Cordiners of Glasgow, there mentioned. To the same effect was the case of the Bakers of Edinburgh against Dowie, 4th Dec. 1783.

Argument for defender.

The defender never does make any cloathes, nor has he any share whatever in the profit of making cloathes; on the contrary, he employs to make them the pursuers themselves, freemen tailors, to whom he pays the full profit of their craft, just as any other customer does. The defender is the pursuers *customer*, for he employs them to make cloathes which he sells. This is equally the case whether the defender has the cloathes ready in his shop, or agrees to get them manufactured of such cloth as his customers choose. In both cases they are manufactured by the pursuers themselves, and only sold, when made, by the defender.

But the selling of goods made by freemen is not part of the tailor craft, nor part of any incorporated trade, so as to be matter of exclusive privilege. It would be inexpedient in the highest degree to prohibit people from selling goods in the very place where they bought them; and there is no decision which supports any exclusive right to such an effect. Those quoted by the pursuers do not; for in all these cases the unfreeman shared the profits of *making*, and did not confine himself to *selling*. On the other hand, the doctrine of the defender is supported by the case of the Wrights of Glasgow against Nosse, 8th March 1765, and that of the Goldsmiths of Edinburgh against Cunningham, 2d March 1802, where it was taken for granted by the Court, as quite clear, that an unfreeman might sell jewellery, if he employed freemen jewellers to make it.

As to the second argument of the pursuers, it depends on the first: For if the defender does not exercise the tailor craft belonging to the pursuers, neither do the freemen he employs pack and peel with him, or violate their oaths.

The

The Court adopted the argument of the defender, and regarded it as a clear case. And accordingly, their interlocutor, on advising the informations, 6th Dec. 1807, was, "Remit to the Magistrates in common "form."

The pursuers reclaimed; and their petition was refused, without answers, 26th January 1808.

Lord Ordinary, *Hermand.* Act. *Advocate.* Alt. *John Macfarlane.*
Agents, *John Dillon* and *J. Brunton.* *Scott*, Clerk.

M.

No. XXVII. *February* 2. 1808.

WILLIAM FORBES, Esq. of Callender,

AGAINST

The TRUSTEES of the EARL of GALLOWAY.

SOLIDUM ET PRO RATA.—CLAUSE—*Circumstances in which the non-acceptance of a* sine qua non *did not render ineffectual the nomination of executors.*

A Hermand on Appeal 31 May 1808

ON the 3d July 1804, the Earl of Galloway executed a trust-deed, wherein he "Gives, grants, and dispones to, and in favour of the "said Ann, Countess of Galloway, my beloved wife, the Right Honour-"able Sir Archibald Macdonald, Lord Chief Baron of his Majesty's Court "of Exchequer in England; the Honourable Sir William Honyman, one "of the Senators of the College of Justice, and others, or to such of "them as shall accept of the present trust, or the survivors or survivor of "them, and such other person or persons as they or the survivors or sur-"vivor of them shall assume."

By a subsequent clause the trustees are authorised to sell certain parts of the trust-estates for the discharge of debts, to borrow money, grant securities, and let leases. After prescribing the order in which the lands shall be sold, the deed grants power to the trustees "to nominate and ap-"point, by a writing under their hands, any person or persons whom "they shall judge fit to be trustee or trustees, for the purposes herein "mentioned, along with them, or after their decease."

It

It then proceeds, " I do also hereby declare, that the majority of my " said trustees, whether named in this deed afterwards to be executed by " me, or to be assumed into the management of this trust, in virtue of " the powers above granted, and who shall accept as trustees, shall be a " quorum ; providing always that the said Anne, Countess of Galloway, " my beloved wife, shall be one of the said quorum, and *sine qua non* : " And also declaring that in case none of my said trustees other than the " said Ann, Countess of Galloway, my beloved wife, shall accept of this " trust, or, if after her death, there shall be only one accepting trustee, or " the number of my said trustees shall be reduced to one, she the said " Anne, Countess of Galloway, during her life, and such single trustee " after her death, shall have full power to act as *a quorum* ; and that every " act and deed done by such quorum shall be equally valid and effectual " as if done by my said whole trustees. And further I do hereby no- " minate and appoint the said Ann, Countess of Galloway, and the other " trustees before named, and the acceptors or acceptor, and the survivors " or survivor of them, and such other person or persons as may, in vir- " tue of the powers hereby conferred upon them, be assumed by them " into this trust, or who may hereafter be appointed by me in manner " foresaid, and their quorum, to be my sole executors and intromitters " with my whole moveable and personal estate and effects," &c.

In the clause in the deed containing the obligation upon the Earl and his heirs to infeft the trustees, the procuratory of resignation, and precept of sasine, the grantees are described as " the said Countess of Galloway, " Sir Archibald Macdonald, Sir William Honyman," &c. ;—" And the " acceptor or acceptors, survivors or survivor of them, and to such other " person or persons as they may assume into this trust, or as I may af- " terwards appoint by a writing under my hand."

The Earl of Galloway having died, four of the trustees nominated in this deed accepted, but the Countess of Galloway did not accept.

On the 5th April 1807, certain parts of the trust-estate were brought to public sale ; and Mr Forbes of Callender was a purchaser to a considerable amount.

A disposition was made out in name of the four accepting trustees, containing the concurrence and consent of the present Earl of Galloway, and of the Countess Dowager, and payment of the price was demanded.

Mr Forbes, in a bill of suspension, maintained, that the proferred disposition was not a regular, sufficient, and unchallengeable title, and that he was not bound to accept of it. That by the conception of the trust-deed, the Countess Dowager was an indispensible member of the quorum, was a *sine qua non*, without whose concurrence as a trustee, the other members of the trust could not validly act. That her non-acceptance sopited the nomination, and some other mode must be adopted of investing the suspender with a sufficient title.

The Lord Ordinary reported the case to the Court ; and, by their direction, 12th December 1807, refused the bill.

The Court were of opinion that if the Countess Dowager had accepted, her consent, as *sine qua non*, would have been necessary to validate

all the proceedings under the trust-deed; but by the terms and conception of the deed, it did not appear to have been the intention of the granter that her non-acceptance should dissolve the trust; and even if it had, the title would then have been in the present Earl, who concurs in the sale.

On advising a petition and answers, (2d February 1808), the Lords adhered.

Lord Ordinary, *Hermand.* Act. *Thomas Thomson.* Alt. *Advocate.*
Jo. Smith, jun. W. S. and *R. Aytoun*, W. S. Agents. *P.* Clerk.

J. W.

No. XXVIII. *February* 3. 1808.

(TEIND COURT.)

MINISTER OF PRESTONKIRK, and the PROCURATOR for the CHURCH of SCOTLAND,

AGAINST

THE EARL OF WEMYSS.

STIPEND.—*Stipends of Ministers may be augmented by the present Court of Teinds, though augmented by it before* *.

IN the year 1793, the Minister of Prestonkirk raised a process of augmentation, and obtained an augmentation of his stipend accordingly. In the year 1806, he brought a second process, demanding another augmentation. The Earl of Wemyss, being one of the heritors of the parish, opposed this demand; and pleaded that the present Court of Teinds, having already granted an augmentation to this living, had no power to grant another.

The point was argued first in presence, and afterwards in memorials.

Argument for pursuers.—At the time of the Reformation, the teinds were the property of the church. They were possessed by ecclesiastics of different kinds; but the clergy having the actual cure of souls had always a super-eminent right, to a sufficient maintenance at least, out of the teinds of the parishes in which they served. To this extent, the rule, *decimae debentur parocho*, was the law of Scotland.

As the Reformation was not an abolition of all national establishment of religion, and as the establishment of the parish clergy in particular was

* See now on this subject, Act 48. Geo. III. ch. 138.

was in no degree superseded or diminished by it, the claim of this part of the church to a sufficient provision out of the teinds only became stronger, when the other ecclesiastical institutions, to which they had been appropriated, were abolished. The reformed clergy, indeed, claimed the full property of the teinds,—Spottiswoode's History, p. 150 and 199. and the justice of their claim was admitted by Parliament in act 1567, c. 10. which calls the teinds "the proper patrimonie" of the church.

Notwithstanding this, the teinds, in various ways, came almost wholly into the hands of laymen; but all the grants by which they were conveyed were under burden of giving a sufficient maintenance to the clergy of the parishes from which they were drawn; and the existence of this burden on the property of teinds, independently of all express stipulation, and in whomsoever that property might be vested, has always been universally acknowledged by all our writers on the subject.—Stair, b. ii. tit. 8. § 21.—Erskine, b. ii. tit. 10. § 10.—It never was imagined that the clergy of Scotland were to be maintained from any other fund.

The lay possessors of teinds having, however, neglected to provide sufficiently for the clergy, after some ineffectual regulations, act 1617, c. 3. was passed, establishing a commission, with power to fix the precise stipend which the minister of each parish should receive from the possessors of the teinds. By this act, a maximum of stipend was fixed; and a legislative promise was given, that no augmentation of the stipends so fixed ever should be demanded. This commission 1617, was appointed to last only till Lammas 1618. Act 1621, c. 5. renewed the provision of act 1617, by appointing a similar commission for the same purposes, with the same powers, and for the term of one year.

But by the proceedings of Charles the First, in relation to teinds, the submissions that were made by the teind-holders, the decreets-arbitral on those submissions, and the acts of Parliament by which the decreets were ratified, the provisions in favour of the teind-holders were completely done away, and the general right of the clergy to a sufficient maintenance out of the teinds revived. A new commission was appointed by act 1633, c. 19. to continue, not for a limited period, but during the King's pleasure. It was empowered to fix sufficient stipends, without any maximum, and no provision was made against future augmentations. This act, too, mentions the right of ministers, though not titulars, to reduce collusive valuations of teinds, which could only rest upon the interest they had from the chance of future augmentations. It ordains the tythes to be sold for nine years purchase, which was far below their value if they had not been liable to the burden of future augmentations.—Erskine, b. ii. tit. 10. § 52.

This commission 1633, without being recalled, was succeeded by another constituted and renewed by acts during the usurpation, (15th Nov. 1641, 24th July 1644, 24th March 1647). These acts were rescinded, but the proceedings of the commission that acted under them were ratified by act 1661, c. 61.

This act appointed a new commission in terms similar to those of act 1633, to which it refers. It particularly empowers the commission "to "appoint constant and local stipends (i. e. in opposition to arbitrary al- "lowances) and grant augmentations;" and it contains no limitation either as to the amount or number of these augmentations. This act, too,

too, allows the titular to allocate the whole stipend upon the teinds of any one heritor, which shews that the teinds were never meant to be given to the heritors as an absolute property, liable only to a definite burden; for such a right in the heritors would never have been left subject to be destroyed at the titular's pleasure. This commission was appointed to continue till discharged by the King.

Without any prior discharge of it, a new commission, in similar terms, was appointed by act 1663, ch. 28. and another commission in the same way by act 1672, ch. 15. This act empowers the commission to modify stipends, "where ministers are not already sufficiently provided," without any other limitation. It empowers them also to give prorogations of tacks of teinds "for all augmentations granted since 1630;" from which it is evident, that the commission 1633, and all the subsequent ones, had the power of granting augmentations.

Commissions in similar terms were constituted by acts 1685, ch. 28. 1686, ch. 22; and by act 1690, ch. 30. which was renewed by act 1693, ch. 23. and continued till the Union, and the act 1707, ch. 9.

From the year 1633, then, down to the year 1707, there was a perpetual succession of commissions, all having the power of augmentation, and without any appearance of restriction, except where the minister was already sufficiently provided. They seem, in short, to have been a succession of courts for the purpose of enforcing, whenever it became necessary, the general right of the clergy to a sufficient maintenance out of the teinds.

The act 1707, ch. 9. bestowed this jurisdiction on the Court of Session.

It is admitted, that by this act the Court of Session has all the powers contained in acts 1633, 1690, and 1693; in short all the powers held by any of the former commissions; and on that ground alone they have power to grant augmentations wherever the minister is not already sufficiently provided.

But, secondly, this act gives them jurisdiction in all things that were referred to former commissions, "as fully and freely in all respects as in "other civil causes;" that is to say, it commits the perpetual right of the clergy to a sufficient maintenance out of the teinds, to the perpetual jurisdiction of the Court of Session, in the same way as all other rights are committed to that jurisdiction. From this it follows, of necessity, that the Court must enforce that right by judgements repeated from time to time, as the variation of circumstances requires; that is, it must give augmentations of stipend, whenever they are necessary, for a sufficient maintenance to the clergy.

Though it could be supposed, therefore, that each of the preceding commissions, or even all of them together, had power only to give single augmentation, that is, a single judgement upon this right of maintenance, yet that circumstance could not limit the jurisdiction of the Court of Session in regard to it, or prevent them from giving repeated augmentations.

Accordingly, it is admitted, that from the passing of this act 1707, the Court of Session has always granted augmentations of stipends which were not sufficient, though they had been augmented by former commissions.

missions. Yet there is no authority for doing this that does not equally apply to stipends formerly augmented by the Court itself, provided they are not sufficient for the proper maintenance of the minister.

For a long time, however, there was no such change in the circumstances of the country, as made it necessary to re-augment stipends already augmented by this Court; and when this necessity at last came, a sort of rule of Court had been adopted against it. But this was founded either on some erroneous notion of *res judicata*, or on some idea of expediency, which had no foundation in law or in truth.

To this rule, however, the Court adhered in the case of Kirkden, 4th August 1779, but the decision was reversed by the House of Lords, 8th July 1784. The very form of this reversal, which was quite simple and general, shews that it was upon the general point. This is proved by a letter of Mr Spottiswoode, solicitor for the church, and by notes of the Lord Chancellor's speech, which were taken by Mr John Russell writer to the signet *, and coincide in substance with notes of the same speech taken by one of the counsel for the heritors. It sufficiently appears, indeed, from the report of this case given by the Collector of Decisions to the Faculty at the time. Fac. Coll. vol. ix. appendix, p. 3. This judgment was followed (according to the report of

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" Dear Sir, *London, 8th July* 1784.

" I wrote you on Tuesday last. Yesterday the Advocate and Mr Erskine were " heard for the respondents, and this day Mr Macdonald replied; after which the Chan- " cellor, in a speech of considerable length, was pleased to *Reverse* the interlocutors of " the Court of Session, which found the pursuer barred from insisting in this action by " the decree of augmentation 1716; and he remitted the cause, *with directions to the* " *Court to proceed* UPON THE MERITS. He said, *there was nothing in the acts or expe-* " *dience, that ought to make such a rule so strict as to prevent them to look into any case;* " yet that, in nineteen out of twenty cases, it would be found discretion to follow such a " rule: That if repeated applications should be made to the Court for re-augmentations, " and if, after looking into all special circumstances, the Court thought no augmentation " should be granted, they had it in their power to punish such wanton applications, by in- " flicting full costs: That, in the present case, he could not say whether or not an aug- " mentation should be allowed; *but he saw no rule in law to prevent the Court from exa-* " *mining the merits of the cause.* I will send you the judgment to-morrow. Mr J. Rus- " sel, writer to the signet, attended the pleadings, and took notes of the Chancellor's " speech, and can give you particular information when he returns. I am," &c.

Follows a Copy of the Notes, taken by Mr Russell,—in the House of Lords, 8th July 1784,—*Miligan* versus *Wedderburn.*

Lord Chancellor.—This case has been argued upon an extensive ground, more extensive indeed than was necessary, and upon a ground which had properly no relation to the question. It is not now before us what provision the clergy should have; but the case before us is to be determined on the law. The question is, Whether, by the law of Scotland, the decree should be affirmed? To understand the question, it is necessary to construe the decree. The *ratio* given, is, that it is incompetent to enter into the consideration of a summons of this kind, if, since 1707, a decree has been pronounced by the Court, giving an augmentation. We are, therefore, to consider, Whether, by the law, there is that sort of bar, by which the Court are prevented from entering upon the merits, not whether, upon the merits, the living would be augmented; whether it is enough to say, there has been such a decree, not whether there is much of sound discretion in the rule; not whether it may be proper, in nineteen out of twenty cases; but whether not one of the twenty cases shall be looked into? If this is the law of the land, it must be good; but if only a principle of discretion, the discretion erected into a rule is inept, unless the law has furnished that rule.

The history of the tithes has been entered into only for the purpose of giving a general idea of the situation of the clergy, and of the constitution of the Court. The tithes were

the teind-clerk) by about twenty cases of second augmentation of stipends before augmented in this Court. The point was notwithstanding again disputed in the case of Tingwall, 4th July 1787, in which the argument was

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originally part of the patrimony of the Church: had they continued so without additions more corrupt, they might have been considered as the *jus divinum* of the clergy, and being made part of the law of the land, that right must have been recognized; but this right was shaken by going into abuse. The reformation in Scotland was too severe. The rights of the Church were considered as a wen which it was necessary to cut off. All ecclesiastical preferments were cut down; and being considered as belonging to no person, they were given to the King. The greatest part of these were annexed to benefices. There never can be a solid establishment without attention to the parochial clergy. All preferments above them is for good discipline and order. In Scotland, all the livings of the parochial clergy had gone into the hands of their superiors.

On the revolution which took place in ecclesiastical establishments, the great men obtained the estates taken from the Church. The clergy in Scotland were left perfectly destitute. The first provision made for them was 300 merks for each benefice; and it is to be observed, that the statute giving them that provision calls it a temporary provision, until the teinds can be restored. They never were restored; and the reformed Church of Scotland remained in a very sad state.

The first statute 1617, raises the provision from 300 to 500 merks, and fixes the *maximum*. In 1621, another commission was named, with an authority to augment the churches. Both these commissions were only temporary; it was wise, therefore, to confine them to augment churches not before provided. If the law had continued in the same form, I would have acceded to the whole argument of the respondents. In 1633, the Legislature encreased the rate at which they were to be augmented. The Court of Session, in interpreting this statute, have thought themselves at liberty to extend the *maximum*, because, in the words of Erskine, " the general intent," &c.

Tithes given to bishops, to hospitals, and other corporations, the one mensal, the other common tithes. A doubt entertained, whether the Court could exercise their authority on these; but these were also considered to be within the reason of the statute.

A variety of commissions were afterwards granted; these vary in an important phrase, having power to augment all parishes where there is not a sufficient provision; a question, whether confined to those not augmented before; never was there such a torture of interpretation. The reference to former commissions is only as to the mode of proceeding; the statute 1690 seems to recognize rather than give the power of revision.

It is said by the respondents, that from 1633 to 1707, it was impossible to reform the acts of former commissions or their own. If this was so, and they could not revise, why should the perpetual commission in 1707 revise the decrees of former commissions? This being the state of the case, it is abundantly clear, that the acts confer the authority of revision, and that they have neither, in defining the powers of these commissions, or in any part of them, created this species of bar to any action.

In all these acts, a number of other authorities are given. Valuations and sales of teinds, as far back as 1633; it was the intention of the Legislature to give to heritors the occupation of their own teinds; it was then thought proper to fix the teinds at one-fifth of the rent. In the 1690, teinds, not in the purview of the old statute, were also fixed, and nine and ten years purchase were the rules then ascertained for the different species of teinds, apparently because an absolute estate in the tithes was not given; but they are always to be subject to a competent provision for ministers.

The law therefore is, that the Court are to review decrees upon the actual situation of the parish. In none of these books is there the smallest trace of this rule; and when Lord Advocate says, the Court are in the daily practice of it, he must mean that it is an idea always afloat in the minds of the Judges.

It has been argued by the respondents, that if this judgment is to be reversed, it ought to be upon the special circumstances of the case; but this cannot be done. At the same time, were the arguments used by the appellant on the general situation of the clergy to pass without notice, it might be productive of worse consequences than the respondents are afraid may arise from determining the general point.

was by joint agreement confined to the general point. The Court again adhered to their rule, and the House of Lords again reversed the decision. There can be no doubt this reversal was on the general point. The special

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I am perfectly clear, it is competent to * appeal from time to time to the Court; but it is impossible that frivolous and vexatious *appeals* can be made with impunity; the Court can award full costs. If appeals are made here, the House always provide the means to make costs effectual where appeals are frivolous; and the recognisance entered, is twice the yearly value of almost any livings in Scotland. I think the Court must, with discretion, go beyond the *maximum*, but that is not before us.

Much has been said of the policy of a proper provision for the clergy. A state has no business with religion, as religion, but merely as a political establishment. Were I speaking here as a legislator, I would say, that the well-being of Scotland was deeply concerned in making a more liberal provision for the clergy. I would have higher promotion,—higher hopes,—and greater preferment. It is that alone can keep the clergy in a situation to be of use to religion. For he must be a wretch, indeed, whose hopes are bounded by the scanty preferment of that country. But in a judicial line, it is impossible to extend the policy.

This case is far from reaching the *maximum*. It was the *minimum* in 1716. But the circumstances are not before the Court of Session, nor what changes may have happened to authorise an augmentation now. I think his having got one, then, may be a bar to his receiving one now; but I cannot affirm a judgment which says, I shall not enter into the consideration of the case. Another question has here been stated, whether it was augmented to the *minimum*. I don't know why the communion-elements should be laid upon the teinds. The communion-money is not affected by any of the statutes. Suppose that fifty merks sufficient in 1716, *non constat*, that, though enough then, it is so now. It is expensive in Scotland; I wish it was less so, that it might be more frequently administered. But who shall say at what the communion-elements were rated. All the instances prove there is no limitation, consequently they should have looked into it.

It appears to me, great inconvenience must arise in allocating where victual given by the Court, though none paid as tithe. The stipend said that it could noway exceed the tithe; in this way it may. If the tithe 800 merks, the stipend four chalders victual, and 100 merks, the value must clearly exceed the tithe.

The Court have no reason in expediency, or authority in law, to say they will not look into it. I therefore move your Lordships to reverse the two interlocutors complained of, and to remit to the Court to proceed on the merits.

Notes of the Lord Chancellor's Speech in Kirkden Case,—by Counsel for Heritors.

Lord Chancellor.—It is not before us at present what provision the wisdom of the Legislature should make, but what the law is. The first thing necessary is to construe the decree. If sense of decree is, that the Court is barred by a rule laid down by the Court itself, such rule is inept if not founded in law. Scotland went to extreme at the Reformation. Parochial clergy, the first object of an ecclesiastical establishment,—parochial clergy in Scotland was left destitute. True patrimony of church never was restored. His Lordship then traced the commissioners commissions; went above the *minimum* upon general intent of Legislature to give the ministers a sufficient maintenance, extended to mensal churches; upon same principle, reference to rules in former acts cannot cut down the authority itself. Permanent commission in 1707 would not have authorised Court to rectify former decrees, if this argument were good. Valuation of tithes fixed at one-fifth of rent at that time, then sale confined to nine and six years purchase on account of burdens. No trace of this rule in law-books. It is an idea of discretion alone. The idea of reversing upon specialties alone, at first sight appeared wise, but upon consideration perhaps it would raise more doubts, and occasion more dispeace and uncertainty. If frivolous suit brought, costs are the remedy. No danger of vexation. Circumstances must be special to admit of demand for augmentation beyond legal rate. * If question were before me as a legislator, would think well-being of Scotland deeply concerned in giving higher establishment and more elevated situations to clergy; but in judicial capacity, will not extend. Do not know whether this minister should be augmented or not. See no reason why he should be augmented. Rather suppose that he ought not; but still question is, Whether decree 1716 a legal bar? besides

* He means to apply to the Court of Session for an augmentation.

cial circumstance mentioned in the judgment of reversal, as well as the remit contained in that judgment, relate entirely to the merits of the claim for augmentation, not to the question of jurisdiction. They are of such a nature, that they could have no influence on the question of jurisdiction.

Accordingly when the cause came back to this Court, the interlocutor applying the judgment was, " That the said Lords Commissioners, in " obedience to the above judgment, do hereby *reverse the interlocutors* " *complained of in the said appeal*; and after hearing counsel as well for " the minister and procurator for the church, as for the heritors of the " said united parish, upon the import and effect of the said judgment " and remit, they find, that in this case it *is competent to the minister to* " *insist in his process of augmentation, modification, and locality, against* " *the heritors of the said united parish, notwithstanding the decree aug-* " *menting the stipend in the year* 1772; reserving to both parties to be " heard in *said process*, upon the several circumstances taken notice of " in the above judgment, and without prejudice to any other plea or ar- " gument which either of them may adduce." And though a petition was given in against this interlocutor, on the ground that the point of jurisdiction was left open by the House of Lords, yet the Court adhered to it on the 25th November 1789. On this occasion, the notes of the Lord President Miller which appear on his session papers, are in these words: " Question about augmentation. Whether decree since Union, " *a bar?* 25th November 1789, *Found no bar.*"

If this interlocutor had given a wrong interpretation of the judgment of the House of Lords, it could easily have been rectified by another appeal, for the same Lord Chancellor continued sitting, but no such appeal was taken. Since that time there has been without interruption to this date of this case, a stream of second augmentations by this Court, affecting the stipends of a very large proportion of the clergy of Scotland. By this long course of practice, the point must now be regarded as shut, whatever had been the merits of the original question. Not to mention the infinite confusion it must occasion at present, the overturning of such a practice must render all law uncertain.

Argument of the defenders.

It is true that the Roman Catholic church, by superstitious pretences and arts, had got possession not only of the teinds, but of one fourth of the lands of Scotland. It is true, also, that when that church was abolished in this country, the reformed teachers made a claim to its whole possessions. But this claim was utterly rejected by the nation. It never was admitted as in itself legal to any extent, by any statute or decision whatever. It was recognized merely in the view of morality or expedience

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sides, *non constat*, that communion-elements may not have required more than 50 merks, or that they should not be increased. No reason either in law or expediency, why they should find themselves barred from looking into case; but when they have done so, will judge according to circumstances. *Reverse.*

dience, and a legal sanction given to it, to a certain extent, by express act of Parliament. Beyond this it neither has, nor ever had, any existence in law. The way in which this right was given to the reformed clergy, was first by giving them a certain share in the greater benefices, which did not consist wholly of teinds, (see act 1567, ch. 10.) and the entire possession of the smaller benefices, (see act 1572, ch. 52,) and afterwards by appointing commissioners to modify stipends to them out of the teinds.

The first commission of this kind was that appointed by act 1617, and renewed by act 1621. This commission was evidently intended to fix these stipends once for all at a low rate; and a legislative promise was given to the teind-holders, that nothing more should ever be demanded of them. But this promise was disregarded by Charles I. and his Parliament, who, after a variety of proceedings, instituted a new commission by act 1633, of which the object, so far as related to the clergy, was to fix their stipends *at a higher rate.* A higher minimum accordingly is appointed by it; the maximum is taken away; and power is given to fix the stipends of all ministers at this higher rate. But these larger stipends were to be fixed by this commission just in the same way as the smaller were to be fixed by the commission 1617, that is, *once for all.* The attempt to bind the Legislature, to be sure, was not repeated, but that had nothing to do with the powers of the commission. The commission was *for a year, or during pleasure*, so that it evidently was not intended to last long. It was appointed, according to the words of the act, "*for the* "*finishing and full perfection*," of a "*glorious work*," which "*could* "*not take a full end*," without the authority of Parliament, and its duty is to "set down *a constant local stipend* for each minister."

By the same act, too, the heritor is empowered to purchase the teinds of his lands, "such as shall rest attour the minister's stipend, and other "pious purposes, which by the tenor of the commission are to be *first* "provided." He was to buy them, too, at nine years purchase, which was a full price. Erskine says the contrary; but he did not advert to the situation of things at the time when this price was fixed, *i. e.* previous to the decreet-arbitral in 1629. Interest was at 10 per cent *, and consequently the price of a perpetual annuity could not be above ten years purchase, and at a time when money was so scarce, it was probably lower. But the teinds were liable to the King's annuity of 6 per cent, so that 9 years purchase was a full price for them. Indeed, by the very same act, the feu-duties of superiorities of teinds, which were liable to no tax or burden of any kind, and were enhanced by casualties, were ordained to be sold to the Crown at ten years purchase. The price, therefore, at which this act authorised the heritor to purchase his teinds, was certainly intended to be, and then was, a full and fair price; so that it never can be supposed that the same act meant to subject those teinds to an unlimited burden, by which, after this purchase, he might be wholly deprived of them without any compensation †.

* Act 1633, ch. 20. first reduced it to 8 per cent.

† To this it was replied, that, at least as soon as 1642, teinds were in fact sold before any modification of stipend to the minister; so that this burden could not well be regarded, even in 1633, as inconsistent with the sale at nine years purchase; and in the future acts no such view could possibly be entertained.

In all these circumstances, it is impossible not to believe that this commission was intended to fix the stipends once for all, and had no unlimited power of augmentation.

The terms of the rescinded act 15th November 1641, renewed 24th July 1644, and 24th March 1647, and of the rescinded act 16th March 1649, afford the same inference, for they allow the commissions they create to grant augmentations of stipends already augmented since 1633, by an express clause, on a special preamble, and in certain very special cases only; and as these acts passed at a time when the clergy were in the highest favour, it is impossible to suppose that an unlimited power of re-augmentation in all cases previously existed.

These acts were rescinded by act 1661, ch. 61. though it ratified the proceedings under them, with this exception, that the decreets of the commissions during the usurpation might be annulled by the commissioners it appointed, on account of "*injustice or exorbitancy*;" which shews that the decreet of a commission was not in its own nature perpetually open.

This act is in all other respects a renewal of act 1633, to which it refers. It mentions in the preamble, that the royal purpose of Charles I. had not yet "*got a final accomplishment*," and that Charles II. was desirous "*of prosecuting so good a work.*" So that the intention of getting the stipends fixed once for all, is no less evident in it than in act 1633.

The acts 1663, 1672, 1685, 1686, are all in similar terms. They all refer to "*the great work not yet finally accomplished*," and renew the powers contained in acts 1633 and 1661.

The acts 1690 and 1693 commence with similar preambles, and are in similar terms, with this exception, that they empower the commissioners "to alter or annul, *for injustice or exorbitancy*," the decreets of all former commissioners, instead of confining this power of review to decreets during the usurpation.

All these commissions then were granted for the prosecution of one great plan of fixing once for all the stipends of all the ministers in Scotland at a reasonable rate. The power of review was given only to afford a remedy in cases where this had not been fairly done.

The granting of *augmentations* is no doubt mentioned in these acts, but there is no reason to suppose this alludes to any thing more than augmentations of stipends fixed before 1633, which, no doubt, might be augmented by any of the subsequent commissions.

The right of ministers to reduce valuations arose from this, that originally the valuation was previous to the modification of stipend, by act 1633, and that afterwards stipends might be affected by a collusive valuation, though they had been granted prior to it; indeed, they might all have been extinguished in this way, if the minister had possessed no power of interfering. It cannot, therefore, be inferred from this interference, that ministers had any right to augmentations unlimited in number.

No instance has been produced where a stipend, fairly fixed by decreet of a commission since 1633, has ever been re-augmented *causa cognita*, down to the year 1707. Under the clause, allowing a power of review for injustice or exorbitancy, some latitude of proceeding may have been allowed, which must have been much facilitated by the destruction of the teind records, which happened by shipwreck, immediately after the restoration,

storation, and by fire in 1702. But no possible interpretation of this clause could authorise a second augmentation by the same commission, while its former decreet remained unimpeached.

The act 1707 transferred to the Court of Session the power of granting augmentations, conform to the rules laid down and powers granted by acts 1633, 1690, 1693. It is plain, therefore, that this Court could have no more power in this matter than these former commissions had. There is not a hint in the statute about giving any *new* right to the church at the expence of the teindholders, nor any appearance from history that such a thing was thought of. The clause, that the Court were to judge in this matter as in other cases, refers merely to the *mode* of exercising their powers. The argument, as to a perpetual court, giving judgment on a perpetual right, is *a petitio principii*. No such right is established by any of the acts of Parliament constituting commissions; and the clergy have no legal right to the teinds but what is contained in these acts. Far less have they any such right as can come under the cognizance of a teind commission, which the present Court of Teinds is. Indeed, if they had any right beyond these acts of Parliament, it must have been a common law right, cognizable at all times, from the Reformation downwards, by the ordinary jurisdiction of the Court of Session, but no such thing was ever heard of.

The present Court of Teinds, however, probably on a liberal interpretation of the power of renewing decreets of former commissions for injustice or exorbitancy, early adopted the practice of granting augmentations of stipends augmented before 1707. And in some few cases it appears that they reviewed their own decreets when they had been obtained by collusion.—See Report of case of Kirkden. But from 1707, down to the date of the judgment of the House of Lords in that case, no instance has ever been produced of a stipend being reaugmented by them that had been formerly modified by themselves in a fair manner. On the contrary, it appears from the reports of the House of Commons, V. II. page 331, that Mr Andrew Chalmers, being called as a witness to give evidence on this subject, before a committee to whom an inquiry upon a petition from the General Assembly for an alteration of the law relative to ministers stipends was entrusted, said, "He had examined all the records of all the decreets of the Court of Session since the Union to the year 1738, relating to the augmentation of ministers stipends, and that he does not know any instance, or find any one upon record, wherein the Court of Session have augmented any living within that period which had before obtained a decree of valuation." The record at that time had been brought up no further than the year 1738. Since that time not only the same negative rule has been observed, but augmentations have been refused on the ground, *per expressum*, that there had been a prior augmentation since the year 1707. This happened in the case of the minister of Strathden, 22d Jan. and 5th July 1766, not reported. That of the minister of Ceres in the same year, not reported. In that of the minister of Arngask, 25th Nov. 1772. Fac. Collect. In other cases this general rule was admitted; and a second augmentation obtained, *per expressum*, only on special circumstances affecting the validity of the first decree of augmentation; minister of Kinettles, 1st July 1767; minister of Lochbroom, 13th Feb. 1769; and in a great variety of other cases. This practice not only afforded a demonstrative interpretation of the

the act 1707, but it was so clear, and of such long continuance from 1707 to 1784, that it was amply sufficient to fix the law in that subject.

Accordingly the Court found so in the case of Craiden. The reversal of that case was on specialties. That there were specialties in the case appears from numbers 3d and 4th of the reasons of appeal, which are founded on specialties; and the best proof that the judgment of the House of Lords rested on them, is to be found in the unanimous decision of the Court of Session in the case of Thgwall, which followed soon after.

This decision, &c. was reversed; but, though the argument in it was on the general point, there were specialties in the case which were brought forward in the House of Lords, and are inserted expressly in the interlocutor of reversal, as considerations or grounds of judgment. That the judgment of reversal was founded on them, appears further from a letter by the solicitor for the respondents *.

The interlocutor, applying the judgment, is by no means explicit as to the general point. It seems to be pronounced only in the case; and is as equally applicable to the judgment of the House of Lords, supposing that judgment to have rested on the specialties. At any rate, the particular defender had no interest to appeal it, since it appeared that, in all events, the minister was to have an augmentation, and the body of heritors were long before weary of supporting the litigation.

The subsequent augmentations were all given without opposition, because the teind holders would combine no longer, and no single individual would, for a small interest, engage in a law-suit with the whole church, which was always ready to take up the question. But practice of this sort cannot constitute law.

The judgment of the Court was, (3d Feb. 1808,) "Find, That this "Court having been established by an act in the year 1707, as a per-"manent Court of Commission, in place of the former temporary Com-"missions, for the purpose, *inter alia*, of modifying and augmenting "the stipends of parochial ministers out of the teinds, it is the duty of "the Court, and within its powers, as recognized by the House of "Lords in two decided cases in the years 1784 and 1789, and by the "uniform practice of the Court, acquiesced in by all parties, in a great "variety of instances, ever since the last-mentioned period, to receive "such applications when made in the regular form, and to determine "upon them according to the state of matters at the time, and the me-"rits of each particular case, notwithstanding a former augmentation "since the institution of the court; and, therefore, that the present case "must be allowed to proceed as usual †."

This

* "The further hearing of Mitchell's appeal came on this day, when Mr Dundas was "heard, and Mr Adam about to reply, when the Chancellor stopped him; and then "made a speech of some length on the specialties of the case, thinking that the Court "had not considered the decrees of 1722 and locality in 1780 sufficiently; and that it "was absolutely necessary to remit the cause, that they might go into that considera-"tion. He was inclined to favour the doctrine, that the Court were not precluded, but "seemed to think the appeal not competent. He wished not to go further at present on "the general question. Lord Kinnaird and Lord Hopetoun both said a few words ap-"proving of the Chancellor's caution. When I get a copy of the judgment, I shall send "it to you."

† Against this interlocutor, the Earl of Wemyss appealed to the House of Lords; and that most Honourable House was pleased to pronounce the following judgment:

"*Die*

This judgment was given by a majority of 10 to 3.

The judges delivered their opinions on this case at very great length. A printed copy of their Lordships speeches, corrected by themselves, has been lodged in the Advocates Library, and is bound up along with the papers in this case, but it was too extensive for publication here. It may only be observed, that those judges who formed the minority appear to adopt the argument for the heritors throughout; and that the majority, with the exception of one judge, who founded his opinion solely on the two cases decided by the House of Lords, adopted in general the argument of the minister, with very little exception. The considerations which seemed most deeply to weigh on this side were, that, by the ancient and established law of Scotland, the proper provision of the parochial clergy was a *burden inherent on the teinds*: That there was nothing either in the acts of Parliament quoted, or the practice of the teind commissions, which was sufficient to extinguish this principle, and to convert the great mass of the ancient spirituality of the church into free property: That, on the contrary, the inherent liability of the teinds to the burden of maintaining the clergy, was every where either expressed or taken

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" *Die Veneris*, 20° *Maii* 1808.—After hearing counsel, as well on Friday the 6th, " Monday the 9th, Wednesday the 11th, Friday the 13th, as on Saturday the 14th " days of this instant May, upon the petition and appeal of the Right Honourable Fran- " cis Charteris Earl of Wemyss, complaining of an interlocutor of the Lords of Session " in Scotland, Commissioners for the Plantation of Kirks and Valuation of Teinds, of " the 3d February 1808, and praying that the same might be reversed, varied, or alter- " ed, or that the appellant might have such other relief in the premises as to this House, " in their Lordships great wisdom, should seem meet; as also upon the answer of the " Reverend Daniel Macqueen, minister of the gospel in the parish of Prestonkirk, and " John Connell, Advocate, Procurator for the Church of Scotland, put in to the said " appeal; and due consideration and debate had this day, of what was offered on either " side in this cause; it is ordered and adjudged, by the Lords Spiritual and Temporal, " in Parliament assembled, That the said interlocutor complained of in the said appeal " be varied, as follows: After the words [find, That] the following words be inserted, " [it is within the legal powers of], and that after the words [this Court], the follow- " ing words be left out, [having been established by an act in the year 1707, as a per- " manent Court of Commission, in place of the former temporary Commissions, for the " purpose, *inter alia*, of modifying and augmenting the stipends of parochial ministers " out of the teinds, it is the duty of the Court, and within its powers, as recognized by " the House of Lords in two decided cases in the years 1784 and 1789, and by the " uniform practice of the Court, acquiesced in by all parties, in a great variety of in- " stances, ever since the last mentioned period]; and that after the words [to receive], " the word [such] be left out, and that after the word [applications], the following " words be inserted, [for modifying and augmenting the stipends of parochial ministers " out of teinds]; and that after the words [former augmentation], the following words " be left out [since the institution of the Court; and therefore, that the present case " must be allowed to proceed as usual], and that the words [made since the year 1707, " be inserted: And it is hereby ordered and adjudged, That, with these variations, the " said interlocutor be, and the same is hereby Affirmed: And it is further ordered, " That the cause be remitted back to the said Lords of Session in Scotland, to proceed " as is just." In consequence of this judgment, the Court, (1st June 1808,) on the petition of Mr Macqueen for application of it, found, " That it is within the legal powers " of this Court to receive applications for modifying and augmenting the stipends of " parochial ministers out of teinds, when made in the regular form, and to determine " upon them according to the state of matters at the time, and the merits of each par- " ticular case, notwithstanding a former augmentation made since the year 1707."

taken for granted in those statutes, as well as in the submissions and decreets arbitral, and in all our authorities on the subject: That in this situation, though each of the former commissions, being temporary, might have confined the exercise of its powers to granting *one* augmentation, yet that it was impossible for the Court of Session, being a perpetual court of teinds, to do this, because, by such a restriction, it must leave the clergy not sufficiently provided, and free the teinds from that burden that was inherent in them: That there was no authority of any kind for the adoption of such a rule: It had been adopted from erroneous views, and without very deep consideration, but it was done away by the decisions of the House of Lords, which established that the powers of this Court was liable to no such limitation. The Lord President, who had been counsel for the heritors in both the cases of Kirkden and Tingwall, and had argued those cases at the bar of the House of Lords, declared his full recollection that both these cases had been decided by that House on the general point. The Lord Justice-Clerk, who had argued the case of Tingwall in that House, expressed a similar recollection with regard to it.

Act. *Connell.* Alt. *Gillies* et *Cranstoun.* *Jo. Murray*, W. S. and *Jo. Anderson*, W. S. Agents.

M.

NO. XXIX. *February* 6. 1808.

MESSRS JOHN PRINGLE, &c. PRINCIPAL CLERKS OF SESSION,

AGAINST

DAVID BLACK and OTHERS, Heritors, and the Rev. Mr SPENCE and the KIRK-SESSION of the Parish of Orwell.

EXPENCE OF PROCESS.—FEES OF COURT.—*In a process the pursuer and defender are conjunctly and severally liable to the Clerks of Session for the dues of extract, although the proceedings have not been extended to a decree.*

IN the parish of Orwell there was no kirk-session; and the fund for the maintenance of the poor had always been under the exclusive administration of the clergyman.

The heritors, conceiving they had a power to interfere in the disposal, and dictate the application of these funds, met in the winter of 1799 and 1800, for the purpose of relieving the necessities of the poor. They appointed a committee of their number, empowered them to use the credit

credit of the rest, and directed them to purchase grain to the amount of L. 100 Sterling, and to apply for reimbursement to the Rev. Patrick Spence the clergyman of the parish and treasurer of the poors funds.

Mr Spence refused to reimburse the heritors, or to permit them to interfere in the administration of the poors funds.

The committee, in name of the heritors at large, raised a process before the Sheriff of Kinross, concluding against Mr Spence, as treasurer aforesaid, for the sum of L. 100 which they had applied for the benefit of the poor.

In this action the heritors were unsuccessful, (3d March 1801,) for the Sheriff-depute found, "That by law the poors funds of every parish "are under the management of the kirk-session and heritors of the pa- "rish for support of the ordinary poor; and that, when the state of the "parish requires any extraordinary assistance, the sum must be sup- "plied by voluntary subscription, or an assessment on the heritors ac- "cording to the valued rent; therefore dismisses the action; but, in re- "spect of the improper manner the cause has been argued by both par- "ties, finds no expences due."

The heritors then raised a declaratory action before the Supreme Court, concluding to have it found and declared, 1*st*, That the heritors of the parish have a joint right and power with the minister and kirk-session, (where there is a kirk-session,) in the administration and distribution of the poors funds of whatever description. 2*d*, That when any acts of extraordinary administration are to be done, such as letting the lands belonging to the poors funds, or exercising any right of property thereanent, uplifting or reinvesting money, the minister ought to intimate from the pulpit a meeting for taking such matter into consideration, at least 10 days before holding the meeting, that the heritors may have an opportunity to be present and assist if they think fit. 3*d*, That the heritors, or any of their number, have a right to call meetings of the whole heritors, minister, and kirk-session, (where there is a kirk-session,) for the administration of the poors funds, as often as they shall see cause; that if the minister should fail to attend such meetings duly called, the heritors assembled may proceed without him; that the majority of such meeting, whether the minister attends or not, may, if they see cause, take the vouchers of the poors money, and the title-deeds of the lands out of his hands, and commit them to any one or more of their number; and the majority of the heritors should have power to appoint persons to the office of treasurer or cashier to these funds, or remove them according to their discretion; and, 4*thly*, That Mr Spence should exhibit an account of his intromissions.

The process before the Sheriff was advocated and conjoined with the declarator. After these actions came into Court a kirk-session was constituted by the members of the presbytery.

After proceeding some time before Lord Meadowbank, Ordinary, the case was reported to the Court on informations; and the following interlocutor was pronounced, (15th Nov. 1803,) "Upon report of Lord "Meadowbank, and having advised the informations for the parties in "this case, the Lords, in respect that the rights of the heritors of land- "ward parishes on the one hand, and of the minister and kirk-session

"of

" of such parishes on the other, were fixed by the decision in the case of " Humbie, by which it was found, That the heritors had a joint right " and power with the kirk-session, in the administration, management, " and distribution of the funds belonging to the poor, and a right to be " present and join with the session in their administration, distribution, " and employment of such sums, without prejudice to the kirk-session to " proceed in their ordinary and incidental charities, though the heritors " be not present or attend; and that, when any acts of extraordinary " administration, such as uplifting money that had been lent out, or " lending or re-employing the same, occurred, the minister ought to " intimate from the pulpit for taking such matter under consideration, at " least ten days before holding the meeting, that the heritors might have " an opportunity to be present and assist if they thought fit; and that " no sufficient reason has been assigned for departing from these rules " on either side in the present case; and also, in respect that no act of mis- " management or malversation on the part of the minister and session has " been condescended on, find it unnecessary to proceed further in these " conjoined actions; dismiss the same, and decern."

To this interlocutor the Lords adhered on advising a reclaiming petition without answers.

Both parties refused to extract decree, or to pay a composition of the clerks dues.

Whereupon the Principal Clerks presented a petition to the Court, praying to be found entitled to the dues of extract. This petition was answered.

Argument for the petitioners.

By act of Parliament the petitioners are entitled to certain fees on all processes brought into Court; and certain regulations were at an early period made for computing these fees in cases where an extract of the proceedings was not desired by any of the parties, (1672, ch. 16. § 29.)

At a subsequent period it was enacted, that the clerks, in further security, should be entitled to retain the pieces produced in process till their fees were paid, (1694, ch. 5. 2d Nov. 1695, Act of Sed.)

Whether the pursuer or defender should ultimately be liable in expence of extract, is a question which in many cases is determined by the Court. Where this point has been undetermined by the Court, it must be a matter of private arrangement between the parties. But in either case, both the parties are liable to the clerks; and in security of their fees, their right of retention of the productions in process applies equally to those made by the pursuer and defender.

Accordingly the Court has uniformly so determined in a long series of adjudged cases.

The first instance in which the point was judicially discussed, occurred in a process between Mr Montgomery of Magbiehill and Mr Murray of Blackbarony; a petition was presented to the Court by the clerks, the parties paid the dues, and no decision became necessary. Principal Clerks of Session against Montgomery and Murray, 11th November 1751. Not reported.

The

The pursuers had soon afterwards occasion to complain of another attempt to evade their claim; but the Court found them entitled to their fees as if the decreet was extracted. Principal Clerks of Session against Stewart and Ayton, 20th July 1753, Acts of Sed.

From this period to the present, the same point has frequently occurred, and received the same decision; 1754, Napier;—20th July 1760, Russell;—20th January 1795, M'Dowal;—3d March 1798, Keir and Robb;—11th July 1800, Gentle's Trustees; all unreported cases.

Argument for the defenders.

The respondents gave in separate answers, in which they united in maintaining a general plea, that there was here no claim for the fees of extract. To entitle the clerks of Session to these dues, it is pre-supposed that an extract is necessary for one or other of the parties; and to compel them to pay for what was neither necessary nor useful to their interest was unjust. In the present case there was no decerniture in the process which could render it a matter either of propriety or interest, that the respondent should possess an extract. It did not contain any *jus exigendi* at the instance of the one against the other. It did not even contain a declarator of their rights.

The parties were not fraudulently transacting the process for the purpose of obtaining the advantage, without paying the expence of extract, for in truth an extract was utterly useless.

Besides, the Court having found it unnecessary to proceed further in these actions, and having dismissed the same, an extract could not be competently given out. An extract might be considered as a *further proceeding*, which the Court had considered to be unnecessary.

The Court, however, were of opinion, that in a question with the Clerks of Session, no discussion could be entertained between the parties respondents, regarding the point of their respective and ultimate liability. In every process, whether an extract be required by the parties or not, the clerks are entitled to their regulated fees as certified by their collector. In the course of the process, both parties avail themselves of the labour of the clerks of Court, of which the dues of extract form part of the recompence, and both therefore must be conjunctly and severally liable for these fees.

The following interlocutor was unanimously pronounced (6th February 1808.) "Find the petitioners entitled to their fees of the within mentioned process, as if the proceeding were extended into a decreet; and therefore decern against the whole respondents, conjunctly and severally, for payment to the petitioners of their dues accordingly, as the same shall be certified by their collector; reserving to the respondents, the said David Black and others, and the said Mr Patrick Spence and others, their recourse against each other, as accords."

Lord Ordinary, *Meadowbank*. Act. *Matthew Ross*. Alt. *Thos. W. Baird*.
J. & C. Bremner and *Geo. Wilson*, Agents. *Buchanan*, Clerk.

J. W.

No. XXX. *February* 6. 1808.

JOHN PRINGLE, &c. PRINCIPAL CLERKS OF SESSION,

AGAINST

MRS ROSE INNES, &c. and JOHN GORDON.

EXPENCE OF PROCESS.—*In a process, the pursuer and defender are conjunctly and severally liable to the clerks of Session for the fees of extract, although the process may have been removed out of Court by extrajudicial transaction.*

THE claim of the clerks of Session arose in these circumstances.

In the year 1798, Mrs Rose Innes of Netherdale, with the concurrence of her husband, raised an action against John Gordon, Esq. of Avochie, writer to the signet, concluding for payment of certain sums of money.

After considerable litigation before the Lord Justice Clerk, Ordinary, an interlocutor was pronounced, in part sustaining, and in part repelling the pursuer's claim.

Both parties reclaimed to the Court; and the interlocutor of the Lord Ordinary was adhered to; but no expences were found due to either party. Mutual reclaiming petitions were again presented. Both petitions were appointed to be answered; but in consequence of an extrajudicial settlement, no farther proceedings took place in the action.

The clerks gave in a petition to the Court, and therein referred to the argument and authorities stated in the former case.

The Court were clearly of opinion, that the clerks of Court could not be deprived of their dues by extrajudicial transactions; and that in all processes, whether pursued to decree or not, they were entitled to their regulated fees as certified by their collector. But as, in consequence of the

the preceding decision, the case was given up by the respondents, no interlocutor stands upon the records of Court *.

Lord Ordinary, . Act. *Mat. Ross*, et *Will. Erskine*. Alt. *Thos. Walker Baird* et *Jo. Hagart*. Agents, *Jas.* and *Chas. Bremner*, W. S. and *Geo. Wilson*, W. S. *Buchanan*, Clerk.

J. W.

NO. XXXI. *February* 16. 1808.

DENNISTON, MACNAYR, and COMPANY,

AGAINST

DUNCAN MACFARLANE.

TACK.—I. *A purchaser of a tack for nineteen times nineteen years from the tenant cannot demand production of the landlord's title.*

II. *A tack may be validly granted to a company* socio nomine.

INFEFTMENT.—III. *A disposition and infeftment* "*to A. B. and the* "*other partners of a company*," *found to be a valid investiture to A. B.*

ON the 7th October 1776, James Donald gave a lease "to Murdoch, "Gillies, and Company, their heirs, executors, assignees, and sub-"tenants whomsoever, of his lands, houses, and yards in Upper Miltoun, "for the space of nineteen times nineteen years."

The company then consisted of Mr Cunningham of Lainshaw, Peter Murdoch, James Gordon, and Robert Dunmore.

In 1787, Mr Cunningham retired from the concern, and sold his share of the company property to the other partners.

They, in March 1778, assumed two new partners, Neil Jameson and James Macdowal; and they disponed the above-mentioned tack to themselves and these new partners *nominatim*, "and to the survivors of them, "the said whole partners, for themselves, and in trust for behoof of those "who may happen to be partners of this company for the time, accord-"ing to their respective shares, rights, and interests in the stock of the "company."

On

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* The same thing happened in the following cases at the same time; cases of the Stirling Banking Company; case of G. Crichton and D. Mill; case of Archibald Johnston; case of Alexander Robertson.

On the 26th August 1791, Anne, Mary, and Margaret Lang, as fiars, and Margaret Aitken, as liferentrix, disponed "to and in favours of John "Gillies, manager, and one of the partners of the Dalnotter iron-works "belonging to Messrs Murdoch, Gordon, Gillies, and Company, and the "other partners of the foresaid Company, according to the respective "rights and interests in the stocks of the said company, and to the dis-"ponees of the said partners or majority of them, and the heirs and as-"signees of such disponees," the lands of Easter Milntown and Shearer Brae. On this disposition infeftment was taken, and a charter of confirmation was granted by the superior both in the same terms as the disposition.

By disposition of date the 28th November 1800, and subsequent dates, James M'Dowal, James Gordon, and John Gillies, surviving and remaining partners of Murdoch, Gillies, and Company, with the consent of the trustees upon the estates of the other partners, conveyed the subjects contained in the above lease and disposition to Robert Dennistoun, Richard Dennistoun, Robert Macnair, James Macnair, and Walter Tassie, copartners of the company of Dennistoun, Macnair, and Tassie.

Walter Tassie, for himself and the other partners, sold the lease and property of these subjects to Duncan Macfarlane writer in Glasgow, who bound himself to pay the price, "on receiving a proper and sufficient "title to the premisses with a sufficient progress of writs."

A disposition in implement of this minute was offered to Macfarlane; but he objected to the sufficiency of the progress, and refused to accept of it or pay the price.

An action to compel him to accept the disposition, and to pay the price, was raised against him in the names of the partners of Dennistoun and Company. In defence, he stated a variety of objections to the titles offered him.

The Lord Ordinary reported the cause on memorials.

On advising these, the Court "Repelled the defences hitherto stated, "and remitted to the Ordinary to proceed accordingly."

The defender reclaimed; and his petition was followed by answers. In his reclaiming petition, he stated a variety of objections, but it does not appear necessary to report more than the following.

Argument for the defender.

I. As to the lease.

First, No title in the person of the granter of this lease has been produced to the defender. But without such production, there can be no secure title to the lease itself; and as this lease is for so long a period that it is equivalent to a feu, the purchaser of it has a right to demand a complete progress.

Secondly, The lease was granted to the Company of Murdoch, &c. *socio nomine*. But a lease is a real right in lands, which cannot be held by a mere political person. It should have been vested in some real

real person in trust for the company. It cannot be said that it was vested in the partners, for it is fixed law that the right of a partner in a company is merely personal not real.

II. As to the property.

The disposition from the Langs, and infeftment on it, is quite inept, for it is given "to John Gillies and the other partners of the Company," a form of disposition and infeftment which is quite unknown in our law. All grants of feudal rights must be to particular persons named and designed; Craig, lib. ii. dieg. 2. § 23.; Erskine, b. iii. tit. 2. § 6. This is essential to the whole system of feudal titles, and particularly to the recording of these titles,—and accordingly it has been decided to be law in the cases, Blackwood against the Earl of Sutherland, 7th Nov. 1740, *Clerk Home* *,—and Melville against the creditors of Smeiton, 14th Feb. 1794. It is vain to say that the disponees are named by reference to the contract of copartnery, for that contract is not expressly referred to; and, at any rate, it forms no part whatever of the feudal title, nor ever could be recorded as such.

Nor can it be said that the disposition is to John Gillies in trust for the rest. It is not so given, but to him directly, and to the other partners directly; nor is it given to him *in toto*, but for his share in the Company stock, and to the other for their share in that stock.

Argument for pursuers.

I. *As to the lease.—First*, In all questions about leases, it is to be presumed that the granter of a lease had a sufficient title in his person if nothing appears to the contrary. The tenant has no right to call for production of the titles of his landlord, merely that he may be more sure his lease is good. Nor can a purchaser of the lease demand of him a production which it is not in his power to obtain. Sir A. Edmonstoune, the heritor, will not give production of his titles to the pursuer, and is not bound to do it, therefore the pursuer cannot be bound to give it to the defender.

Secondly, There never was supposed to be an objection in our practice to a lease granted to a company *socio nomine*. It is quite a common form. There is no formal authentication, or record of leases; so that even if it was necessary to name the lessees individually, that is sufficiently done by reference to the contract of copartnery, which is a deed as public as the lease itself.

II. *As to the property.*

Though it would have been more regular to have named all the disponees in the disposition, yet this was not essential. It may be done by reference; and there was here, by implication, a sufficient reference to the contract of copartnery, which was registered in the books of Council and Session before the date of the disposition. But, *Secondly*, If the other partners of the Company were not effectually invested by this disposition,

* Same in Kilkerran, *voce* Sasine.

at least the disponers were wholly divested, and therefore the full right has passed into Gillies, who was named and designed. Whether he was made a trustee or not, is of no consequence. If he was invested, the title offered to the defender is sufficient; and if no right passed to the other disponees, he must have been fully invested.

The Court thought that there was nothing in the objections to the lease.

And that the second answer to the objection to the disposition was sufficient, especially as all parties interested in the subject were ready to concur in the disposition; and accordingly "Adhered to the interlocutor "reclaimed against."

Lord Ordinary, *Polkemmet*. Act. *Connell*. Alt. *Fletcher*.
Agents, *David Wemyss*, W. S. and *John Dillon*. *Pringle*, Clerk.

M.

No. XXXII. *February* 19. 1808.

JOHN FORRESTER

AGAINST

JAMES WRIGHT.

TACK.—1*st. An outgoing tenant being bound to consume the whole fodder on the lands, and lay the whole dung thereon the last year of his tack, having withheld part of it from the lands at the last crop, is obliged, without payment, to leave to the incoming tenant the quantity so withheld. And, 2dly, To that part of the dung made after the bear seed time, the incoming tenant has a preferable right, on payment of the value.*

THE defender held a lease under Mr Hogg of Newliston, wherein he was, *inter alia*, "bound to eat and consume the whole straw "growing on the said lands with his bestial, and lay the whole dung "thereon the last year of the tack, at bear seed time." When this lease was on the point of expiring, the pursuer acquired a lease of the lands.

The defender having failed to apply, in terms of his lease, the dung made at the bear seed time of 1806, the pursuer petitioned the Sheriff to find, "That the said James Wright has forfeited all right to the said "dung, in and through his having not laid the same upon the lands at "last bear seed time, in terms of his tack, and that the said dung is the "property of the petitioner."

On this application, the Sheriff pronounced the following interlocutor, (20th March 1807)

"Finds

" Finds that the latter part of the clause, in the defender's tack, relative to the straw and dung of the farm, imports a limitation in the tenant's favour, as to his penult crop, of the obligation set down in the former part of said clause, and applicable to the fodder and dung of all former years; and that, in terms of the same, he was only obliged to lay upon the lands, at bear seed time of the last year of his tack, such dung made from the fodder of crop 1805, or otherwise, as was then ready, or, in course of fair and equitable management, should have been then ready for manure, and ought to have been on the lands towards raising crop 1806; and that the defender has right to payment from the pursuer, the incoming tenant, and at an equal fair rate, for the dung made after bear seed time 1806, and not unduly delayed in the making till after that seed time: Therefore nominates and appoints Mr Stenhouse Hood, Mr William Wilson, and Mr Gideon Pitloh, or any two of them, to visit and inspect the several dunghills on the lands in question, and to report in writing, and on oath, respecting the number of cart-loads or cubic yards of dung contained in the said several dunghills, and the value of the same per cart-load or cubic yard; and whether, in their opinion, the dung from crop 1805, and other dung on the farm, has or has not been unduly withheld by the defender from crop 1806; and, if it was so withheld, to what number of cart-loads or cubic yards the abstraction seems to have been; and for this purpose authorises the said visitors to call in and employ a proper person to measure the said dunghills in their presence; appoints the said visitation to take place in presence of parties, or of persons authorised to act for them; and grants commission to the procurator for either party to take the visitors oath on their report; and appoints the said petition, answers, and replies, to be laid before them."

The persons, to whom the remit was made, reported, that one-half of the dung had been unduly withheld from the lands at crop 1806.

Two of the reporters gave in an additional report, stating, " That from every information we can learn, in similar cases, the waygoing tenant is allowed half price for any quantity of dung not used by him, which he ought to have laid on at bear seed time."

On these reports, the Sheriff pronounced the following interlocutor, (12th January 1807.)

" Finds that the defender is entitled to full payment from the pursuer for one moiety of the dung presently on the farm, and amounting to 450 cubic yards, and estimated by the reporters at L.90; and that the pursuer, the incoming tenant, has preferable right to said moiety of the dung, upon payment of said estimated value, or sufficient caution found to the defender for the same: Finds it sufficiently instructed, that in preparing the ground of this farm for his waygoing crop 1806, the defender did unduly withhold the fodder and dung of 1805, to the amount of 450 cubic yards of dung, which, in course of fair and equitable management, he was bound to have laid on the lands, towards

" wards

" wards raising crop 1806; and being of opinion that the defender " would have benefited in his waygoing crop by the application of said " dung thereto, yet he suffers this damage by his own deliberate and " wrongful act, and that the same does not turn to the benefit of the " pursuer, the incoming tenant, who, by receiving the said quantity of " dung now, wherewith to recruit the wasted land, is not so well off as " he would have been by the seasonable application of the dung in 1806, " towards maintaining the land in good heart and condition: Therefore " finds, that the pursuer has right to the said 450 cubic yards of dung, " without payment; and that there is no just ground for making any " allowance to the defender on account of the same: finds the defender " liable in expences, and allows an account of the same to be given in."
And the following note was subjoined:

" The tenant's claim to half value, or any value, for the dung abstract- " ted, the reporters found on an alleged custom; but it is impossible " there can be any custom of the county referable only to the case of a " plain wrong done by the tenant, and which, if allowed, would be a " constant temptation to him to do such wrong; and, for the reasons " assigned in the interlocutor, the new tenant cannot justly be found " liable in any such allowance."

A bill of advocation against this judgement was refused; and the case came by petition and answers before the Inner-house.

Argument of the defender.

1*st*, With regard to the dung withheld from the farm. Although the defender may have transgressed his lease in withholding part of the dung from the land, yet it does not follow that the pursuer is entitled to it without payment or consideration. If the whole quantity of manure had been laid on the lands, the defender would have reaped a greater crop, and the pursuer would have lost the benefit of it to the same extent, because it would have been so far exhausted by that year's crop. The pursuer, therefore, by getting the unexhausted manure receives a greater advantage than if the terms of the lease had been strictly complied with. *Nemo debet locupletari aliena jactura;* but the pursuer, by the Sheriff's interlocutor, is about to derive a direct advantage from a loss no less direct to the defender, in consequence of an innocent misconstruction of his lease, on the supposition that manure remains three years in the ground, and that the first year's crop exhausts as much of it as the two subsequent, it is fair and equal that the pursuer should pay one half of the value of the dung. In the opinion of two of the reporters, such is the general practice of the country.

2*d*, With respect to the 450 cubic yards of dung to which the pursuer has been preferred on paying the estimated price, there is nothing in the terms of the lease, nor in the common law, which compels the defender to dispose of it to the incoming tenant. It is as much his property as the way-going crop, and he is entitled to sell it to any purchaser, and in any manner that may be most agreeable to himself.

Argument

Argument for the pursuer.

By the *rationes decidendi* contained in the Sheriff's interlocutor and note, the pursuer is relieved from the necessity of any argument. The point, besides, has been already solemnly determined by the Court, 27th January 1767, Finnie against Trotter,—16th June 1801, Earl of Wemyss against Wright.

The Lords adhered, (18th February 1808.)

Lord Ordinary, *Polkemmet.* Act. *J. Gordon.* Alt. *David Cathcart.*
A. Milne, W. S. and *Rich. Cowan*, W. S. Agents. *W.* Clerk.

J. W.

No. XXXIII. *February* 24. 1808.

INCORPORATION OF FLESHERS OF DUNDEE,

AGAINST

ROBERT WOODCOCK.

BURGH ROYAL.—*The son of a "Recruit," who has served "honestly "and faithfully for the space of four months, but being unfit for ser- "vice is rejected," is entitled to the benefit of the Act 24th Geo. III. c.* 6.

WILLIAM WOODCOCK quitted the army with the following discharge: "By Major John Ross commanding the thirty-first "regiment of foot, whereof Sir Adol. Oughton, K. B. is Colonel, These "are to certify, that the bearer hereof, William Woodcock, recruit in the "regiment aforesaid, has served honestly and faithfully for the space of "four months, but being unfit for the service is rejected, and is hereby "discharged, having first received a full and true account of all his cloath- "ing, pay, arrears of pay, and all demands whatsoever, from the time "of his enlisting to this present day of his discharge, as further appears "by his receipt on the other side hereof. Given under my hand and "seal of the regiment, this thirteenth day of July one thousand seven "hundred and seventy-four.

(Signed) "Jo. Ross, *Major.*"

On the back of the discharge there is the following docquet: "I Wil- "liam Woodcock do acknowledge, That I have received all my cloath- "ing, pay, arrears of pay, and all demands whatsoever, from the time "of my enlisting in the regiment and company mentioned in the other "side, to this present day of my discharge; as also days "pay to carry me to

" As witness my hand, this thirteenth day of July one thousand seven " hundred and seventy-four.

(Signed) " WILLIAM WOODCOCK."

Robert Woodcock, the son of William, having carried on business as a flesher in Dundee, the incorporation of that craft complained to the Magistrates, who (9th Sept. 1806,) assoilzied the defender with expences. The pursuers then advocated the cause to the Court of Session; and Lord Armadale, in respect no answers had been lodged, remitted with instructions to alter; and the Magistrates altered their interlocutor accordingly. The defender then pursued an advocation, which was discussed before Lord Polkemmet, who advocated the cause, and assoilzied the defender with expences.

The pursuers reclaimed to the Court.

Argument for Pursuers.—The defender being a *recruit*, and having been *rejected as unfit for service*, is neither within the words nor intendment of the statute. From the words of the statute, 24th Geo. III. c. 6. and of all the other statutes on the subject, it is clear that the benefits therein contained are intended for those who have actually *served as soldiers.* The object of the legislature is further evinced from the periods at which the different statutes were passed. The successive statutes were passed at the termination of different wars, when, on the reduction of the army, a great number of men were returned to the occupations of civil life, and when, from motives of policy, it became necessary to facilitate their identification with the general mass of the people. These privileges were likewise designed as a fair and just reward to those whose lives had been dedicated to the service of their country, and who had thus been prevented in early life from obtaining, by regular apprenticeships in common form, the privileges of the incorporations. The first statute on the subject is that passed in Charles II's. reign, immediately after the Restoration, 12 Ch. II. c. 16.; the second, is the 10th and 11th William III. c. 11. passed in the year 1697, after the treaty of Ryswick; the third, is the 12th Queen Anne, c. 13. passed after the treaty of Utrecht; the fourth, is the 22d Geo. II. c. 44. passed after the treaty of Aix-la-Chapelle; the fifth, is the 3d Geo. III. c. 8. passed shortly after the treaty of peace in 1762; and the sixth, and last act on which the defender claims, passed after the treaty of peace with America. All these being enacted at particular emergencies, tend to shew the purpose of the legislature.

Such being the design of the legislature, the defender is not entitled to the benefit of the act, because the defender's father never properly belonged to the *service*, and was only a recruit, and not a soldier, in the sense of the statute. So far from having served, he is declared to have been rejected as unfit for service.

Argument for defender.—In military language, a recruit is as much a soldier as the most experienced veteran, and four months service is as effectual to secure the benefits of the statute as any longer period. The term *recruit*, designates those who have been inspected by the surgeon and passed, who have received the bounty, have been put on the muster roll of the regiment, and have been entered in the periodical return of its strength by the commanding officer,—accordingly " *Recruits*" form

form one of the heads of these returns. If a man, who offers himself for enlistment, on being inspected by the surgeon, is reported unfit for service, he receives no certificate or discharge at all, and is not considered technically to be a recruit. A recruit, on the other hand, is the designation of a person who has been admitted as a soldier into the battalion, whose name is on the muster and pay lists, but who has not been posted into any particular company, nor appointed to any appropriate station in the regiment.

From causes into which it is now too late to inquire, the defender's father had become unfit for service before having been attached to any particular company, but had been under military discipline, training, and duty, for four months.

The Court, after having advised with military gentlemen, adhered to the interlocutor of the Lord Ordinary, 20th Feb. 1808.

Lord Ordinary, *Polkemmet.* Act. *J. A. Murray.* Alt. *F. Jeffrey.*
Geo. Andrew and *Pat. Orr*, W. S. Agents. *M.* Clerk.

J. W.

No. XXXIV. *March* 1. 1808.

(See Report of this case, 27th May 1800.*)*

SIR ALEXANDER KINLOCH,

AGAINST

JAMES ROCHEID.

PRESCRIPTION NEGATIVE—*May take place against a general accounting for tailzied funds, though saved as to particular articles.*

THIS case having, according to the judgment of the House of Lords, been again taken into consideration by the Court, they appointed memorials. On advising these, the Court pronounced this interlocutor: (Jan. 27. 1807,) "Sustain the defence of the negative prescription a-"gainst the general accounting demanded by the pursuers, and adhere "to their interlocutors, in so far as the same have been submitted to re-"view, in terms of the order of the House of Lords." The case was again laid before the Court by petition and answers. The arguments already given in the former report were gone over again at great length; but it does not appear necessary to restate them here. In addition to these arguments it was now pleaded,

For

For the pursuer.

1*st*, As the defender's father and himself were not heirs *alioqui successuri*, the only right by which they held the subject in question was Mr Rocheid's settlement. This right, however, was not absolute, but qualified. It was a trust. The defender's father and himself were indeed among the persons, and first in order among them, for whom the trust was granted, but that did not make it less a trust than if it had been granted to a mere stranger, for instance to an accountant. Now, what was the right arising out of this trust to those in whose favour it was granted? It was a right of calling upon the trustee to account for the whole trust funds, and to employ the balance according to the trust. It was not a right to any particular sums; it was nothing else but a right to a general accounting, and to a certain disposal of the balance on a general accounting. Suppose, then, this right, though arising out of a condition essentially qualifying the defender's right, to be capable of the negative prescription, it cannot prescribe by less than a total neglect of 40 years, and it must prescribe *in toto*, or not at all. It cannot be kept alive with regard to certain sums, and not with regard to the rest. For the acknowledgement of the trustee, with regard to those sums, was an acknowledgement of the general obligation to account, the only obligation to which he was subject; it could not be an acknowledgement of any special obligation relative to these sums, for none such existed. It was an acknowledgement, in short, of the trust, and must preserve it *in toto*.

The distinction between cases where a part of a right may be saved from prescription, and a part cut off, and those where, if any part is save, the whole must be saved, is pointed out by Mr Erskine, b. iii. tit. 7. § 46. and 47. and appears in the Decisions Lord Balmerinoch against Hamilton, 22d June 1671, *Stair*.—Laird of Waughton against Home, 26th June 1635, *Durie*.—Macleod *contra* Vassals of Muiravonside, 25th July 1727. Dict. *voce* Prescription, vol. ii. p. 129.

In the one set of cases, the right or the obligation has been divided into distinct parts. The parts of it have fallen into the hands of different creditors, or have come to affect separately different debtors or different subjects. In the other set, the whole right remains in the same creditor or creditors, and affects equally all the debtors or subjects of it. Hence, in this last case, if one of the debtors or subjects should be untouched for 40 years, still the right is not diminished by prescription, but remains entire, and continues to affect that debtor or subject as well as the rest. Now, the right under this trust is of the latter description. It was not divided in any way; it all remained in the same creditors; it continued wholly to affect the same debtor and the same subject.

But this right is unquestionably preserved with regard to certain sums, for so the Court and the House of Lords have found. This finding is not in a question of positive prescription, but negative. It is a finding, not that the defender cannot prescribe positively, because his right is intrinsically limited, but that the right of the pursuer cannot be prescribed negatively in relation to those sums. That must be because there has been an acknowledgement of the pursuer's right by the defenders in relation

lation to those sums, for nothing else could prevent the negative prescription. The making up of titles, and allowing the money to remain on the old securities, is viewed in this light; but, at all events, some circumstance in the case is so viewed; and whatever it be, it must be an acknowledgement of the *trust*, and must preserve it *in toto* from prescription.

For the defender.

It is denied that this deed constituted a trust; but that is of little consequence, as it is admitted, in this argument, that the supposed trust did not do more than create an obligation liable to the negative prescription. The defender has shewn, that this prescription has run against that obligation in general, and that it is extinguished as to the funds in general. It may be presumed, that the obligation is derelinquished, or that it never existed; that no such funds ever came into the hands of the defender's father. The respondent is not bound to give any account of them, because he holds a legal discharge under the statutes of prescription. As to them he is entitled to say, that no surplus ever existed; and he cannot be required to go into any account to shew in what manner the fact really stood. But, on the other hand, it may very well be said, that where there are certain funds clearly belonging to Mrs Rocheid's estate remaining upon her original securities, and only uplifted within the years of prescription, the defender has not the same defence. He cannot say, with regard to them, that they have been exhausted in the payment of debts, or that there once was a discharge of them which may have been lost. As they are uplifted under Mrs Rocheid's settlement within the years of prescription, he cannot dispute that they at least are funds disponed by her for the purpose of being laid out in favour of the heir of taillie; and, as he has no prescription to plead, he can only defend himself by going into the fact, and shewing that they do not constitute a surplus after payment of the debts and legacies.

In short, the general obligation to account for all Mrs Rocheid's funds, or for the surplus of the whole of them, is entirely and absolutely cut off. But this notwithstanding, there are certain funds which have remained invested as her succession, and been uplifted in virtue of her settlement within the forty years, which the respondent is liable to account for, and apply as surplus, unless he can show that they were otherwise exhausted. The petitioners may call this a division of the obligation into parts, if they think proper; but the legal idea will not be changed by any form of expression which may be adopted, and it is fully sufficient to distinguish this case entirely from all those referred to on the other side.

The case of one part of a general obligation being preserved from prescription, while the rest is cut off, is very far from being new. The rule is thus given in M'Dowal's Institute: "If a creditor assign part of his "bond, the cedent using diligence for the remainder, or the assignee for "the part assigned, will not interrupt the prescription as to the sums for "which no diligence is used, more than if they were contained in a se- "parate bond; for as the negative prescription is grounded upon a pre-

" sumption of payment, doubtless the debtor might have paid the one, " and still be indebted in the other."

The principles of this rule apply to the obligation in Mrs Rocheid's settlement. In like manner, any funds which may have been intromitted with, before the commencement of the forty years, may have been exhausted in the payment of the debts, or the obligations with regard to them may have been in various ways fulfilled or discharged, while, at the same time, other funds remain, with regard to which it may be clearly unsatisfied. But as the effect of the negative prescription is to presume payment, or discharge, absolutely with regard to every thing previous to the forty years, this presumption cannot be elided by the mere fact that certain other intromissions, within the forty years, have been found not entitled to the benefit of the same presumption.

Two of the Judges adopted the argument of the pursuer; and one Judge particularly observed, that though he was of opinion the whole obligation to account was prescribed, yet since he had been forced by the judgment of the Court, and of the House of Lords, to give up that opinion, and to hold that the obligation was preserved as to certain sums, he must presume that the trust itself was acknowledged and preserved from prescription *in toto*.

On the other hand, the majority of the Court did not quite adopt the argument of the defender; but rather seemed to be of opinion that the original right under the trust had been violated by the acts of the defender's father to a certain extent, and that to this extent there had been an *interest* to pursue in the substitutes of entail, in consequence of which their right to the same extent was lost by prescription. That as to the particular debts remaining on the old securities, in regard to them no violation had taken place; and therefore there had been no interest to pursue on the right, and the substitutes in relation to them had no *valentia agendi cum effectu*. That in this respect the case was similar to that of the Earl of Dalhousie against Maule*.

The judgment of the Court, was " Adhere to their interlocutor re- " claimed against."

Lord Ordinary, *Stonefield*. Act. *John Clerk* et *David Monypenny*. Alt. *Jas. Moncrieff*. Agents, *James Bremner* and *C. Innes*, W. S. *Scott*, Clerk.

M.

* March 1. 1782.

No.

No. XXXV. *March* 2. 1808.

JAMES CAMPBELL

AGAINST

DONALD M'KELLAR, and Others.

INFEFTMENT.—*Infeftment prior to the period of* 40 *days before the term of Whitsunday, and prior to the calling of the summons of removing in Court, but posterior to the date and execution of the summons, sustained as a sufficient title in an action of removing.*

BY disposition dated 8th August 1806, the Duke of Argyll disponed the lands of Baringlongart, and others, to Lord John Campbell, who was infeft on the 3d and 5th of September following.

In the month of February 1807, Lord John Campbell disponed these lands to James Campbell the pursuer, who was infeft on the 24th March, and whose entry to the lands was declared to commence at Whitsunday thereafter.

The right of the pursuer, therefore, was completed before the period of 40 days preceding the term of Whitsunday.

The lands were possessed by the defenders, from year to year, at a low rent.

The pursuer raised a summons of removing, dated 7th March 1807, which was executed on the 16th and 17th days of the same month, and concluded for removal at the term of Whitsunday 1807 from the pasture, and at the separation of the ensuing crop from the arable ground.

The action was called in Court on the 3d April. Thus the libel was dated and executed before the pursuer had taken infeftment; but before it was called in Court his right had been completed *.

The Sheriff of Argyleshire assoilzied the defenders from the action.

The cause was then brought by advocation before this Court; and having been discussed before Lord Balmuto, Ordinary, his Lordship advocated the cause, and decerned in the removing; and, upon advising a representation, pronounced the following interlocutor:—"In respect "that it appears that the pursuer, in February 1807, obtained a disposi- "tion from the Duke of Argyll to the lands occupied by the defenders, "his entry to be at Whitsunday following, and infeftment taken upon "the said dispositions upon the 24th March 1807; that the summons "of removing, raised by the pursuer against the defenders, bears date "the 7th March, to remove from the lands possessed by them at the "Martinmas

* Certain communings, relating to the removal of the defenders, occurred between them and the pursuer, which were made the subject of argument in the pleadings, and were thought worthy of notice in the interlocutor of the Lord Ordinary. But these were of a nature altogether indecisive; and did not in the slightest degree influence the Court in deciding the question.

" Martinmas following, and was executed personally against the defen-
" ders upon the 16th and 17th days of March 1807; that the same
" was called in Court upon the 3d day of April following, ten days after
" the pursuer was infeft in the lands, when decree passed in absence;
" that, previous thereto, it is stated by the pursuer, and not denied by
" the defenders, that intimation was given to them of the pursuer's in-
" tention to remove them from the lands which they possessed on verbal
" agreements; and that in consequence thereof a transaction for purchas-
" ing their stock was concluded betwixt the defenders and the pursuer's
" brother, and a missive granted by him to them as to the terms of the
" purchase, and also an agreement made for allowing them to possess
" pasture for their cows: Therefore, and upon the whole circumstances
" of the case, refuses the desire of the representation, and adheres to the
" interlocutor complained of."

The defenders reclaimed to the Court.

Argument for defenders.

1*st*, The pursuer having raised his summons before investing himself with a legal title, all proceedings thereupon must be null; and the production of an infeftment, *posterior* in date to the execution of the summons, cannot cure this fundamental defect.

Of all civil processes that of removing tenants from their possessions has been subjected to the greatest strictness of interpretation in every step. If the summons of removing be called a day within the period of 40 days prescribed by the act of sederunt, the process is ineffectual.—Being thus rigorous in the formality of the process, Is our law less attentive in a much more essential matter, the sufficiency of the pursuer's title?

On the contrary, in the early times of our law, previous to the act 1555, ch. 39, and when the warning in its form and period was barbarous and precipitate, (Stair, b. ii. tit. 9. § 39.) the utmost accuracy and certainty was required in that article. A warning could only be given by the *master of the ground*; and this character could only be vested in him by infeftment.

Thus, at a period when the civil rights of the lower orders were much disregarded, the utmost strictness was required in the title of those who pretended to disturb or remove a tenant. In 1449, tacks were invested with the character of real rights, and were rendered effectual against singular successors; and doubtless the importance of this rank of labourers had risen in the public opinion, because, about a century afterwards, in the year 1555, an act was passed prescribing the order of warning and removing.

The act 1555, ch. 39. while it introduced certain regulations relating to the mode and period of warning, left the title of the pursuer in its former situation; and, in the opinion of the best institutional writers, after that act passed, infeftment, previous to the precept of warning, was necessary to constitute a title to pursue.—Stair, b. ii. tit. 9. § 39, 40, 41.—Bayne's Notes on Mackenzie, b. ii. tit. 6. § 11. & 12.—Bankton, b. ii. tit. 9. § 54.—See also Kilk. *voce* Title to Pursue, Feb. 1749, Paxton against Hunter.—Erskine, b. ii. tit. 12. § 28.—The act of sederunt 1756 was then passed, rendering the process of removing more simple; but, so far

as

as the requisites of the pursuer's title are concerned, it introduced no innovation. Accordingly, in the case of an apparent heir, whose possession may in some degree be considered as a mere continuation of that of his predecessor, and whose situation therefore is highly favourable, infeftment was nevertheless required. This case, too, occurred immediately after the passing of the act of sederunt; and was decided by the judges by whom the act was framed, (15th Dec. 1757, Paton against M'Intosh.)

In later cases an heir has been allowed to make up his titles, *cum processu*, and to produce his infeftment before extract. But a singular successor cannot have any such indulgence.

2. The entry of the pursuer was not to commence till the term of Whitsunday; and, prior to this period, his right, even if infeftment had followed on it, was not complete. The pursuer was thus attempting to exercise one of the most important acts of property, before he could in law be held as having obtained possession of the lands.

Argument for pursuer.

Prior to the act 1555, warning was merely a verbal intimation by the *master of the ground*; and subsequently to that act, it was given in the form of a precept in writing, executed by the baron officer, and was thus an act of jurisdiction. Feudal investiture was necessary to authorise any act of jurisdiction; and therefore a person uninfeft could not issue a precept of warning. Hence the origin of the custom or rule.

The substantial policy of the law, however, was merely to protect tenants from being disturbed by persons without sufficient title; and, therefore, in cases where the tenant could have no doubt of the master's right, infeftment, previous to the precept of warning, was not required. Thus, a removing was sustained at the instance of an heir, though his retour and sasine were after the warning,—Stair, b. ii. tit. 9. § 41.—and at the instance of liferenter by courtesy and terce, and of a tacksman in possession. With the decay of the ancient principles of jurisdiction this maxim has still farther relaxed; and a late writer (Erskine, b. ii. tit. 6. § 52.) has stated, that there is room to doubt of the unqualified observance of the rule in modern times. The Court accordingly, by a series of decisions, have gradually departed from the rule; and have considered that a naked disposition carries to a singular successor a right to the lands, rents, and leases, and consequently a right to remove tenants. The possession of a tenant depends merely on his lease; and, on the expiry of its endurance, it can afford no title to stand in opposition to the conveyance of the estate in favour of a purchaser. There is no sound reason why the judge-ordinary should not, in these circumstances, give effect to the purchaser's title.

Accordingly the Court have found that a judicial factor uninfeft could remove tenants, (Thomson against Elderson, 9th July 1757.) It was afterwards found that a decree of sale was a sufficient title to enable the purchaser to pursue a removing (21st January 1791, Stewart against Spalding, *N. R.*) More recently, a summons of removing at the in-

stance of an uninfeft purchaser, and the factor of the seller, who had been invested with the usual powers, including that of removing tenants, was sustained (24th June 1802, Morison against Ferguson.) And by the latest decision on the subject, a removing was sustained at the single instance of an uninfeft purchaser (23d November 1807, Milne against Petrie *.)

This rule, therefore, may now be fairly considered to be antiquated, and to have expired with those peculiar principles and institutions in which it arose.

But independently of this view of the case, the supervening infeftment, produced before the decree, must draw back to the date of the summons, and cure all defects.

The act of sederunt 1756, enables proprietors to raise a summons before the Judge Ordinary; and there is no reason why an infeftment produced before decree should not be as admissible and available in this as in any other ordinary action †.

2d,

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* This case was reported by Lord Newton, from the Bill-Chamber; and was as follows.

Alexander Young purchased a ridge of land lying in the Burgh Acres of Arbroath, but did not take infeftment on his disposition. (5th December 1799). Young let this piece of ground on a verbal lease to William Petrie a carter in Arbroath.

Young, remaining still uninfeft, disponed the property to James Milne, (23d November 1805.) Milne, without taking infeftment, raised a summons of removing before the Magistrates of Arbroath, concluding that Petrie should remove at the term of Martinmas 1807. This summons was executed and called in Court more than forty days before the previous Whitsunday.

The defender objected, that the pursuer was not infeft; and the Magistrates pronounced the following interlocutor (18th Sept. 1807.) "Having again considered this process, with the reclaiming petition, sist farther procedure until the pursuer produce a "sasine in his favour, which is the only proper title for carrying on the action."

The Court were of opinion, that, in the circumstances of the case, infeftment was not necessary. The defender could not have objected the want of sasine in a question with Young, from whom he derived his lease. Every right, however, that existed in Young's person was conveyed to the pursuer; and the objection must be as incompetent in the one case as in the other.

The Court remitted, with an instruction to repel the defence.

† The following case, which has been overlooked in the pleadings, affords another instance of the inclination of the Court to disregard the ancient rule. It is not reported; but was as follows. 10th February 1802, Brown against Lang.

James Lang, the defender, derived his lease from the father of John Brown the pursuer.

After his father's death, Brown, on his mere apparency, and before investing himself with any title, raised (21st February 1800) a summons of removing on the act of sederunt 1756, concluding that the defender should remove from the arable lands at March 1800, and from the grass and pasturage at the Whitsunday thereafter, which was called in Court on 7th March, more than forty days preceding Whitsunday.

The summons was given out to see; and (14th June) returned with a defence, that the pursuer had produced no title.

The process remained in this situation till 1st April 1801, when the pursuer raised and executed a summons of wakening.

On the 1st July 1801, the pursuer completed his titles, and was infeft.

The pursuer, therefore, had commenced the process, and allowed the term at which he concluded against the tenant for removal to elapse, before completing his title.

The

2d, A purchaser, after obtaining his disposition, is entitled to take measures to render his possession effectual at the term of his entry. He is not entitled, and does not attempt to enter or insist in a removing previous to the term of Whitsunday. But he has right to use all legal remedies to make his right good at the period of its commencement.

A great majority of the Court were of opinion, that the title of the pursuer was sufficient. While the removal of tenants was accomplished by a precept of warning executed by the bailie or officer of the proprietor of the land, and while the landlord was exercising an act of jurisdiction, infeftment previous to the date of the precept might be necessary. But the law has relaxed gradually from the rigour of this ancient rule; and, without injuring the security of the tenantry, a more simple process of removal has been introduced. In terms of the act of sederunt, the calling of the summons 40 days before Whitsunday, is equivalent to an execution of warning. If infeft, therefore, as in this case, *at the time of calling the summons*, the pursuer is to be held and considered as having warned. Such was the opinion of the Court in the case of Stewart against Spalding; and the security of the tenant is not affected, because, before decree, the title of the pursuer must be completed.

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Balmuto*. Act. *Wm. Macdonald*. Alt. *J. Burnett*.
Coll Macdonald, W. S. and *Rob. Campbell*, W. S. Agents. *Buchanan*, Clerk.

J. W.

No.

The case was discussed before Lord Bannatyne, Ordinary, who pronounced (7th July 1801) the following interlocutor: "The Lord Ordinary having heard parties procurators upon the grounds of the libel and defences; in respect the pursuer came into Court with his action before establishing a title in his person by infeftment, and did not afterwards obtain his title, and procure himself infeft until more than a year after the original action was called in Court, and the term long expired at which he concludes for removing; therefore sustains the defences, assoilzies the defender, and decerns; superseding extract till the 3d sederunt day in November next."

The Court, however, (10th February 1802) altered this interlocutor, and decerned in the removing with expences.

(BILL-CHAMBER.)

No. XXXVI. *March* 5. 1808.

ISABELLA MAXWELL,

AGAINST

ALEXANDER WALLACE.

HUSBAND & WIFE.—*An interim separate allowance will not be given by the Court, to a wife who has only commenced an action of separation.*

ISABELLA MAXWELL brought an action of separation before the Commissaries against her husband Alexander Wallace. In the course of this action she presented a petition to the Commissaries, praying them " to ordain Mr Wallace to pay to her, or to her solicitor, the sum of " L. 200 Sterling, or such other sum as might seem proper, towards " interim aliment and defraying the expences of this process." This petition the Commissaries refused. On this she presented a bill of advocation to the Court of Session, which Lord Craig, Ordinary on the bills, appointed to be answered. The answers not being given in during three weeks, she presented a note to Lord Cullen, then Ordinary on the bills, praying for an immediate remit to the Commissaries to grant her the interim allowance she had demanded. His Lordship appointed the bill to be printed; and reported the case. It was pleaded for the pursuer, That she was ill used by her husband, and could not live with him, so that she required a separate aliment: That if she were defender in an action of divorce she would have an interim allowance for that, and expences of process; and it would be hard to deny it to her when she was pursuer in an action of separation: That if this were refused, such actions could not be maintained by wives at all.

The defender denied the ill usage; and stated, that he was willing to receive her into his family, so that she had no need of separate aliment; and that it was contrary to the established rules of the Commissary Court, which had always been followed in such actions, to grant any interim allowance in such cases.

The Court thought the demand premature; and therefore remitted to the Ordinary to refuse the bill.

Lord Ordinary, *Craig*. *Joseph Cauvin*, W. S. Agent.

M.

No.

No. XXXVII. *May* 12. 1808.

MISSES GLASFORD

AGAINST

JOSEPH ASTLEY.

PROPERTY.—*The proprietors of a small garden in a town found entitled to erect a screen of wood on their own ground close upon the windows of an adjoining proprietor's house, which looked into their garden, for the purpose of excluding these windows from this view; there being no servitude,* luminibus non officiendi, *and the windows being two of them newly made, the third newly enlarged.*

THE Misses Glasford were proprietors of a garden attached to a house in Borrowstownness. Joseph Astley was proprietor of a building immediately adjoining, which had some windows looking into this garden. This property had no servitude, *luminibus non officiendi*, over the garden. Astley, in order to make a better use of his property, enlarged one of the windows looking into this garden, which had formerly been an open granary window with wooden spars, and converted it into an ordinary dwelling-house window with a glass casement. Though the garden was overlooked from various other quarters, yet the Misses Glasford, not liking it to be so closely looked into as it became liable to be from Astley's windows, erected a wooden screen, on their own property, but within a foot and a half of these three windows, and so high to cover all of them. After submitting to this for two years, Astley pulled it down by his own authority; on which Misses Glasford applied to the Sheriff to compel him to re-erect it at his own expence, and to prohibit him from touching it in future.

Astley at the same time petitioned the Sheriff to prohibit the Misses Glasford from re-erecting it.

In these processes the Sheriff pronounced this interlocutor, (Dec. 27. 1805,)—" The Sheriff conjoins this complaint with the complaint at " the instance of Joseph Astley relative to the same subject; and " having considered the debate in both processes, finds that Mr " Astley has not produced, nor alleged the existence of any writing " which grants him a servitude of free light or prospect over the " property of the Misses Glasford, or which can serve as the ground " of a plea of possessory judgment; which plea is further inapplicable " to this case, in as much as two of the windows in question have only " recently been struck out of the wall by Mr Astley, and the third has " been recently enlarged and altered by him from an open granary window with wooden spars into an ordinary dwelling-house window with " a glass casement: Finds that the wooden screen complained of by Mr " Astley was confessedly erected by the Misses Glasford, within the bounds " of their own property, and at the distance of seventeen inches or " thereby from the wall of his house;' and as the said operation has a

" lawful and allowable object in maintaining the privacy of their gar-
" den, and hindering the same from being over-looked or injured from
" the windows of Mr Astley's house, and this at a less expence to them-
" selves than by erecting a wall of stone and lime, which they might
" warrantably do, it cannot be reputed an act done in *emulationem vicini:*
" Therefore, and having considered the judgment of the Court of Ses-
" sion in the late very similar case of Dunlop against Robertson, 1st
" Dec. 1803, finds that Mr Astley did wrong in cutting and throwing
" down the said screen; removes the interdict granted against the Misses
" Glasford relative to the erection of such a screen; and prohibits Mr
" Astley from again throwing down the same when erected *."

The defender advocated the case to the Court of Session, when the Lord Ordinary pronounced this interlocutor, (May 31. 1806,) " Advo-
" cates the cause; repels the defences pleaded for the raiser of the advo-
" cation, Joseph Astley; and decerns against him in terms of the inter-
" locutor of the Sheriff complained of in the advocation."

The cause came before the Inner-house by petition and answers.

Argument for the petitioner.

No person is by law allowed to use his property in *emulationem vicini*, to build up any thing, for instance, on his property, which is of no use at all to himself, but of great detriment to his neighbour. Nor is this all. Nothing will be allowed to be built which causes a great evil to a neighbour, unless it is of considerable or serious use to the person who builds; and, particularly, nothing will be allowed to be built which, without any serious use to the builder, directly and immediately hurts a neighbour. These are the established doctrines of what is called the law of nuisance. They are recognised in the laws of all countries. In that of England, *vide* Blackston, b. iii. ch. 13.—The King against White and Ward, 20th May 1757, Burnet's Reports. In the civil law, which is universally received in Europe.—Gaill. Observ. Practic. lib. ii. obs. 69. § 28.—Gratiani, Discept. Forens, c. 745, n. 37, 38.—Heringius de Molendinis, quaest. 15. § 34.—Mevii Comment. ad jus Lubec. p. 3. t. 12. art. 7. § 30, 31, 32.—Menoch de Arb. Jud. cas. 156. § 9.—In the law of Scotland, " No man," says Lord Stair, b. ii. t. 7. § 7. may " dispose so upon his own ground as to put any positive prejudice, " hurt, or damage upon his neighbour." See also Bankton, b. ii. t. 7. § 15.—Erskine, b. ii. t. 1. § 2.—Fraser against Dewar of Vogrie, Jan. 20. 1767, Sel. Dec.—Ralston against Pettygrew, July 29. 1768, Dict. v. iii. p. 173.—Ibid. Steele against Crokat, June 1. 1791. But in this case the advantage to be gained is quite trifling and fanciful, since the garden,

* In a note subjoined to this interlocutor, the case of Robertson is thus reported by the Sheriff, (Mr Hume, Professor of Scots Law).—" Robert Robertson writer in Ayr had a house there, with a small back ground, not more than 30 feet long, and enclosed with a wall 8 feet high. His neighbour, Dunlop, having built a house within three feet of this back ground, with its windows looking that way, Robertson pulled down his old wall, and erected a new one, which darkened the windows of Dunlop's house. The Lord Ordinary, and afterwards the whole Court, found that Robertson had a right to do so.

garden has no pretence to privacy. The evil done to the petitioner is very great; for it shuts up the windows of his house; and it is quite direct, for the screen is erected expressly to shut up these windows, and for no other purpose whatever.

It is very true that a proprietor may build a wall to the edge of his property without regarding the lights of his neighbour. But that is, because it is very highly useful for him to build in this manner to the edge of his property. When a house, or even a garden wall, is built in this way, there is no suspicion of *emulatio*; the useful purpose of such erections is sufficiently apparent; and without any inquiry it is fairly presumable from the very nature of them. A stone wall is so expensive, that nobody would build it merely for whim or ill nature; and therefore it may, in all situations, be safely presumed to be done for a reasonable purpose. This presumption may be usefully admitted to save nice investigation; and on this principle was decided the case mentioned in the Sheriff's interlocutor. There a solid and expensive stone wall was built; but in this case there is no room for any such presumption, as the screen here erected cost little or nothing. The fact then must be looked to, which plainly is, that it was of no serious use to the respondents; no use bearing any proportion at all to the evil suffered from it by the petitioner.

Argument for respondents.

The rule of law, that a person having ground in property free from servitude, may build on it to the verge without regard to the buildings that stand on the adjoining property, is highly expedient. It is plain and simple; every body can know it; and suit their conduct to it. It prevents inextricable difficulty in settling the rights of neighbours. Accordingly it is fixed in our law past all question *. The case of Dunlop against Robertson is a sufficient example of it, where a set of windows were covered by a wall built for that very purpose; and the Court found that it could lawfully be done. It is a mere jest to say, that a stone wall is different in this respect from a wooden screen. It is argued, indeed, that the building of a stone wall, being expensive, affords a presumption of a serious purpose of utility to the builder, which the raising of a wooden screen does not; but it is absurd to talk of presumptions where the fact is quite plain. The purpose in the case of Robertson was nothing else but to avoid being overlooked; that was too plain to be matter of presumption; and the same purpose exactly exists in this case. It would be ludicrous to say to the respondents, you may cover these windows by a wall of stone, perhaps of brick, but not at all by a wooden wall, for malice builds in wood, but rarely in brick, never in stone. The case of Robertson did not go on any such presumption, but on the general rule that a proprietor of ground may build to the verge of his property. This rule is absolute, and excludes all question about *emulatio*.

If

* So found, 10th March 1613, Sommerville, *Dict.* vol. ii. p. 274. Donald against Dick, 15th November 1750, *Falconer*;—Clark against Gordon, 8th July 1760.

If there were room for a question of *emulatio*, there is here no proof of *emulatio*. The respondents have an advantage from keeping up this screen, for it prevents what they feel to be an evil, *i. e.* their garden being liable to a close inspection, at all times, by the inhabitants of the petitioner's house. This feeling is nowise so rare or whimsical as to be undeserving of regard. There is, therefore, no proof of *emulatio* or malice.

As to the idea that not only an advantage, but a considerable advantage must appear to be gained, when a person uses their own property so as eventually to put a neighbour to inconvenience, in short, that there must be a proportion approaching to equality, between the advantage to be gained by the one and that lost by the other, it is far too vague and open to arbitrary opinion to be law. It would throw loose the whole law of property, and occasion inextricable litigation. The utmost that can be said, is, that what is plainly done from mere malice shall not be allowed; but if any use can be shewn, such as removes the charge of malice, that is enough. This, accordingly, is all the length to which the writers or other authorities of our law, that are quoted, go.

The civil law is the same; and no text is produced to shew the contrary, though the commentators, whose speculations are not trammelled by practice, entertain various opinions. One half of those quoted, however, are in favour of the respondents; but our own decisions are our best commentary on the civil law, of which we have in this matter adopted, and applied the principles.

The English law of nuisance has no application, for the lights stopped here are not ancient lights, as those were in the case Blackstone mentions.

The Court (24th Feb. 1808) adhered to the interlocutor of the Lord Ordinary.

The defender reclaimed; but his reclaiming petition was refused without answers (12th May 1808.)

The majority of the Court adopted the argument for the respondent, one Judge thought that of the petitioner well founded.

Lord Ordinary, Act. *Dun. Macfarlane.* Alt. *J. Glasford.*
Agents, *John Tweedie*, and *Macritchie & Little.* , Clerk.

M.

NO.

NO. XXXVIII. *May* 17. 1808.

JAMES EWING Trustee on the Sequestrated Estate of MACALLISTER and BRYSON,

AGAINST

WILLIAM JAMESON.

BANKRUPT.—*The circumstances that a caption was raised against a debtor, and that a messenger with that caption in his possession, but without instructions from the creditor to put the debtor in jail, and without displaying his blazon, or by any form executing the caption, but merely notifying that he had a caption, compelled the debtor to go with him to the chamber of the agent for the creditor, where he (the debtor) remained for an hour, and then was allowed to go away by the consent of the agent for the creditor, no execution being returned by the messenger, are not sufficient to constitute imprisonment in terms of the act* 1696, *ch.* 5.

WILLIAM MACALLISTER, merchant in Glasgow, on the 17th June 1801, granted a disposition of a dwelling-house in Glasgow to William Jameson, who took infeftment thereon on the 19th of that month.

William Macallister's estate was sequestrated soon after; and James Ewing was appointed trustee upon it. He brought an action for reducing the disposition to William Jameson under the act 1696, ch. 5. on the grounds,

1*st*, That the disposition was not given for a price then paid, but in extinction of a debt previously due by Macallister to Jameson. 2*dly*, That Macallister was then insolvent. 3*dly*, That Macallister was imprisoned within 60 days of the date of the sasine.

Jameson in defence denied all these circumstances.

A proof was allowed to both parties (2d December) by the Lord Ordinary; and a state having been prepared and reported, counsel were heard in presence, and memorials were ordered on the whole cause.

On advising these, the interlocutor of the Court (May 15. 1807.) was, "Repel the reasons of reduction, assoilzie the defender from the conclusions of the action, and decern." This interlocutor was given on this reason, which rendered the consideration of the other points unnecessary, that the Court did not think Macallister had been imprisoned in terms of the act 1696.

The pursuer presented a reclaiming petition, in which he directed his argument chiefly to this point *; and this petition was answered.

* The defender objected to the competency of parole evidence in this case, on the ground that apprehension by a messenger was an *actus legitimus*, which could only be proved by a regular execution. But the Court did not pay any regard to that plea. It was held to be settled law that parole evidence of apprehension or imprisonment constituting bankruptcy was admissible.

The facts of the case in relation to this point, sufficiently appear in the following extracts from the proof. James Elder, writer in Glasgow, who was the law-agent of Sir Michael Cromie and Company, depones, "That "he was employed by Leckie, Ewing, and Company, merchants in Glas- "gow, to raise ultimate diligence, at the instance of Sir Michael Cromie "and Company bankers in London, against Macallister and Bryson mer- "chants in Glasgow, and William Macallister one of the individual part- "ners of that Company. That he accordingly raised such diligence; and "for this purpose he put the caption already in process, soon after its "date, into the hands of Macrone and Fullarton messengers in Glasgow, "with instructions to endeavour to recover the debt, and for that pur- "pose to apprehend William Macallister; but he does not recollect that "he gave any instructions to incarcerate him. Depones, That in con- "sequence of these instructions, he has reason to believe that William "Macallister was accordingly apprehended, and kept for some time in "the writing-room of James Macrone messenger; and his ground of "belief is, that while Macallister was thus in custody of the messenger, "he either came along with the messenger, or sent a message to the de- "ponent, or to D. Macnayr writer in Glasgow, then the deponent's "partner, requesting to be liberated; upon which, either the deponent or "D. Macnayr communicated the request to Leckie, Ewing, and Com- "pany, their employers, who consented to his liberation; and the depon- "ent further thinks, that the date of Macallister's being taken into cus- "tody, as above described, was the 1st of August 1801, both from the "certificate to that purpose on the back of the caption, and from a charge "being made in Macrone and Fullarton's books, against the deponent, "for apprehending William Macallister of that date."

Allan Fullarton depones, That "the deponent is certain, from the en- "try in the books kept by him and Mr Macrone, that William Macallis- "ter was apprehended on the 1st of August 1801." And he further de- pones, "That, after being so apprehended, the deponent carried him to "the office of Macnayr and Elder; and the deponent, after detaining "Macallister there for a short time, got orders from D. Macnayr to li- "berate him; and he does not think that the time from which he ap- "prehended Macallister till the time he liberated him exceeded an hour. "Depones, That he never received any instructions from Macnayr and "Elder to imprison Macallister, but merely to bring him to their office, "in case he did not pay the debt."

John Macausland, a clerk to Macallister, depones, "That in the sum- "mer of that year (1801) but the particular month he cannot recollect, "he remembers that Mr Macallister went along with Allan Fullarton, a "preceding witness, to the counting-room of Macnayr and Elder, and "the deponent understood that he did so in consequence of Fullarton's "having a caption against him at the instance of Sir Michael Cromie "and Company; and when Mr Macallister returned to his counting-room, "he informed the deponent that he had obtained a delay in payment of "the debt for which the caption was raised. Depones, That he does "not think there was an interval of an hour between the time Macallis- "ter went out with Fullarton and his returning to his counting-house."

There

There was a certificate on the back of the caption, which in substance agreed with Fullarton's deposition, and it was admitted not to be a regular execution. On the facts thus proved, it was argued,

For the pursuer.

The apprehension of a debtor upon a caption, and his being actually in the custody of a messenger, is imprisonment in the meaning of the act 1696, ch. 5. This is fixed by the judgment of the House of Lords in the case of Woodston against Scott in 1755, Fac. Coll. vol. i. p. 206. and 331, and by a variety of cases since decided agreeably to that judgment.—Macadam against M'Ilwraith, 23d November 1771;—Fraser against Monro, 5th July 1774;—Macmath against Mackellar's Trustees, 1st March 1791 *.

The case of Elliot against Scott, 3d March 1768, is not of an opposite nature, for in it there was no actual custody, but a simple arrest; the same remark applies to the case of Maxwell against Gibb, 17th November 1785, in which the messenger expressly said he had not apprehended the debtor, nor taken him into custody, and to the case of Richmond against Dalrymple's Trustees, 14th January 1789.

But in this case, there was apprehension and custody. The debtor was taken by virtue of the caption, and kept for an hour. So far from his not being in custody, the messenger would not, and did not, liberate him till he had orders from Messrs Macnayr and Elder, nor did they give such orders till they had received authority from their employers. It is, therefore clear, that Macallister was "in custody of the messenger," which, according to the terms of the judgment in the case of Woodston, constitutes imprisonment under the act 1696.

It is of no consequence that the apprehension took place without display of blazon. This may be a necessary circumstance in a charge of deforcement, because it may be said that the person accused did not know the character of the messenger. But when the debtor acknowledges and submits to the messenger's authority, such formality is not necessary to the valid execution of the caption. This is laid down by all our writers, Stair, b. 4. tit. 47. § 14.; Bankton, b. 1. tit. 10. § 195.; Erskine, b. 4. tit. 4. § 33. Accordingly, in none of the cases above quoted, was that circumstance at all enquired into or regarded.

For the defender.

The Scotch Legislature, when it made use of the word imprisonment in the act 1696, did certainly mean *putting into prison.*

For, in the *first* place, the word is hardly susceptible of another meaning.

In

* See account of these cases in Bell's Bankrupt Law, vol. i. p. 28. and following pages.

In the *second* place, there were good reasons, arising out of the nature of the Scotch bankrupt law, which must have determined the Legislature to require actual incarceration as a constituent of bankruptcy.

Previous to the act 1696, we had reductions on the head of bankruptcy; and it is plain that the Court of Session had adopted a distinction between insolvency and notour bankruptcy. It was decided not to be sufficient in these actions that a person was insolvent, and even known to the defender to be so, unless he was also holden and repute bankrupt. Circumstances were required to be proved sufficient to establish this notour bankruptcy. Cochran against Langton, 8th February 1694, *Fountainhall*;—Creditors of Carlourie against Lord Mersington, 21st December 1694, and 16th January 1695, *Fountainhall*, vol. i. pages 652 and 659.

These cases seem to have given rise to the act 1695, which was made for the purpose of establishing a test of *notour* bankruptcy. For this purpose some public event was necessary. Such an event was the debtor's being put into a public jail, or his flying to a sanctuary, or his absconding. But his being merely apprehended, and in the custody of the messenger, is not such an event, since it is quite private. It might be a test of insolvency; but no test of that was wanted. On the contrary, by the act, insolvency is to be proved, and itself forms part of the test of notour bankruptcy.

Considering, too, the nature of bankruptcy, and its effects under this statute, it was necessary that the test of it should be very decisive and very public.

The essence of bankruptcy is the necessity of dividing the debtor's estate among his creditors; it is the knowledge of this in the debtor, and in those who have received rights from him, that makes those rights proper subjects of reduction. But to constitute a proper test of this knowledge, and still more, a test that was to operate by presumption retrospectively, it was necessary to have some event which should not merely prove insolvency, but should be of a nature to bring in the creditors to a claim for division of the insolvent estate, and should demonstrate to the world as well as to the debtor, the necessity of dividing that estate among them. Such an event was the putting of the debtor into a public jail, but such was not mere private custody of him by the messenger. Actual incarceration, too, was an event of easy and certain proof, and therefore fit to be pitched upon as a criterion on which important legal consequences should depend, but mere custody by a messenger was just the reverse.

Thirdly, From the nature of personal execution in Scotland at the time the act 1696 was passed, the word imprisonment in that act must have meant actual putting in prison. For the only imprisonment it mentions, is imprisonment on a caption. Now the style of a caption itself shews what is imprisonment on it, for it orders the messenger to apprehend the person of the debtor; "and being so apprehended, to put him "in sure ward, firmance, and captivity within their respective tolbooths," &c.

The

The judgment in the case of Woodston was not a general decision that custody in the hands of a messenger was imprisonment in the meaning of the act, but only that it was so in the special circumstances of that case. And it appears that there were specialties in it. If it had been in point, however, it was contrary to the spirit of our Scotch bankrupt law, and must have been given from the House of Lords looking too much to the peculiarities of the law of England, which in this respect is in a different situation from ours; so that this case did in no view deserve the respect that has been paid to it as a precedent; and cases resting solely upon its authority must be regarded as erroneous. At the same time none of the cases quoted for the pursuer are nearly so strong as the present, supposing the situation of Macalister, during the hour he was with the messenger, to have been custody in his hands; and the case of Elliot against Scott, 3d March 1768, affords an instance where there was custody in the hands of the messenger, and this was found not to be imprisonment in terms of the act 1696.

But in truth, in this present case, there was no custody in the hands of the messenger. The messenger never had instructions to imprison Macallister in any sense of the word, but merely to find him out, and to recover the debt; accordingly he never displayed his blazon, nor in any form took him into custody. But all our law books require the display of the blazon, and the touching with the rod of peace in order to an effectual execution of the caption, Stair, b. iv. tit. 47. § 14; Bankton, b. vi. tit. 37. § 13; Duty of a Messenger, p. 6. Here, however, the messenger did none of these things, but, merely by letting Macallister know he had a caption, made him go to Macnayr and Elder's office, where he staid a short time, without any further compulsion, and then was told that he might go away. The caption was not therefore executed against him at all; he not only was never in prison, but never in the custody of the messenger. He was, in short, merely apprehended, which it was determined in the case of Maxwell against Gibb, 17th November 1785, and of Richmond against Dalrymple, 14th January 1789, was not imprisonment in the sense of the act 1696.

Some Judges thought this case similar to that of Woodston, and were for deciding it accordingly; at the same time it was observed by them, that that case seemed to have been decided from views relative to the English practice, where custody in the hands of the bailiff, in a spunging house, precedes putting into the common jail in all cases, if the debtor chooses it, and where this is a sort of imprisonment that has all the effects of actually putting in jail.

But the majority expressed their opinion, that though the case of Woodston was good authority, so far as it went, and though it decided that proper apprehension and custody in the hands of the messenger were equivalent to putting in jail; yet that this rule was not to be stretched beyond that decision, and that in this case there was no custody in the hands of the messenger, nor even apprehension in the legal sense of the word. For there was no execution of the caption, such as would have made it deforcement to have rescued the debtor; there was nothing more than a proposal to go to the office of Macnayr, enforced no doubt by the power

of executing the caption, but not by the actual execution of it; that the character of a messenger was now commonly combined with that of an agent for settling the debt; and the messenger made use of the caption to give weight to his proposals, by telling that he had it ready; but that the execution of it required a further and more solemn act, though perhaps this solemnity was not so precisely defined as could be desired.

The judgment of the Court was, "Adhere."

Lord Ordinary, Act. *Ar. Fletcher.* Alt. *Dun. Macfarlane.*
M. Montgomerie and *John Dillon*, Agents. *M.* Clerk.

M.

No. XXXIX. *May* 17. 1808.

MAGISTRATES OF FORFAR AND ALEXANDER MALCOLM

AGAINST

WILLIAM POTTER.

THIRLAGE.—IMPLIED CONDITION.—*A person bound by thirlage to grind malt at a certain mill, and to give for the grinding a certain proportion of the malt grinded, has a right to repayment from the person receiving this multure of the duties paid to government on the malting of that proportion,—the duties being imposed subsequent to the constitution of the thirlage.*

THE inhabitants of the royalty of the burgh of Forfar are, by a charter of novodamus of Charles II. and usage thereon, astricted to the wind and steel mills belonging to the corporation, for all malt they have occasion to grind. The multure is one peck for every six firlots of malt to the mill-master, together with a lippie to the miller; or the 25th boll to the mill-master, and one firlot to the miller.

By the statute, 12th Q. Anne, stat. 2. c. 11. a duty of sixpence per bushel was laid on malt. It was ordained to be paid by the maker of the malt, and to be charged according to a measurement of it made by the excise-officer while it was steeping. In the year 1725, this tax was in Scotland reduced to threepence per bushel. During the reign of George II. the malt-tax in Scotland was raised to 3s. 11d. and 5-20ths of a penny per boll. In the year 1802, it was raised to 10s. and 15-20ths of a penny per boll. In the year 1803, it was raised to L.1. 2s. 15-20ths of a penny per boll.

In

In the last mentioned year, the brewers within the royalty of Forfar, conceiving that the burden of this duty, in so far as it was paid on the malt delivered as multure, ought to fall on the persons receiving this multure, applied to the Magistrates of the burgh for an order to that effect. This was refused; on which one of the brewers, William Potter, abstracted the malt grinded by him from the mills of the burgh. The tacksman of the mill, Alexander Malcolm, on this presented a petition to the Sheriff, praying that Potter should be ordained to deliver the multure on 150 bolls abstracted, according to the rate above mentioned. Potter admitted the right of thirlage and the abstraction, but refused to deliver the quantity of malt due as multure, unless the pursuer would repay him the duty which he had paid to government upon it.

The Sheriff-substitute found, (1st Nov. 1804,) "That the defender is "entitled to payment from the pursuer of the duties imposed on malt "in the years 1802 and 1803, for the malt he is bound to deliver as "multure for what is grinded at the mill mentioned in process." On an appeal to the Sheriff-depute, he (20th Nov.) "adhered to the interlocutor of 1st current; and as the quantity alledged to have been abstracted is not denied, decerned against the defender for the multure "libelled of 150 bolls of malt."

The cause was brought into the Court of Session by an advocation, in which the Magistrates of Forfar made themselves parties.

Potter founded his claim for repayment of the duties on two different grounds: 1*st*, The 25th section in the act of Queen Anne, above-mentioned, which gave an allowance for the tax to persons paying *rent*, and which he maintained applied to multure as rent; 2*dly*, On the equity of the case, independent of such clause.

The interlocutor of the Lord Ordinary was,—"Finds that the 25th "section of the 12th of Queen Anne, being the first act which imposed "a duty upon malt, which grants a deduction or abatement of the duty "in certain cases, is confined to rent reserved and payable in malt, and "is specially limited to the tenants of lands subject to such rent; therefore "finds that the said act cannot be construed to extend to mill multures, "which are not rent of lands, but the contract average wages of the work "performed, including profit and capital employed; finds it admitted in "the fifth page of the answers, that the practice of the sucken of the "Forfar mills, has been in conformity with the above interpretation of "the statute, from the period when the malt tax was first imposed by "the 12th of Queen Anne, down to the year 1802; Therefore advocates the cause, alters the interlocutors of the Sheriff, and finds that "the respondent and defender is bound to pay to the complainer and "pursuer the accustomed multures, at the rate of the twenty-fifth boll "for the master, with one firlot to the miller, without any deduction or "abatement on account of the duties payable, or to be paid, to Government; and in respect that it is not denied by the respondent that he has "abstracted to the amount of 150 bolls of malt, finds him liable in "multures and sequels on this quantity at the above rates, and decerns."

This

This interlocutor was brought under review of the Inner-House by the defenders.

There was an argument upon the first ground maintained by the defender, but as the Court did not go upon that, it does not appear necessary to report it.

On the second ground it was argued,

For the pursuers.—The pursuers simply demand, in terms of title of thirlage, redelivery or retention of the *ipsum corpus*, of a certain proportion of the malt they grind in return for the grinding. They are certainly not bound to take a smaller proportion, nor can their retaining this proportion, in terms of their right, subject them in any payment to the defenders, merely because a tax has been imposed on malt.

The only reason given why the tax should produce this effect, is that it has raised the value of malt; but supposing this to be the case,

In the *first* place, there is no condition in the contract, constituting the right of thirlage, either direct or implied, giving such an effect to such a circumstance. It is not said there is any direct condition of that nature; and the words of the title of this thirlage, so far from implying it, plainly imply the contrary. The constitution of this thirlage may be regarded as a contract *de futuro*, to deliver a certain quantity of malt for a certain quantity of grinding. Now, it is necessarily implied in such a contract, that the things stipulated shall be delivered in kind, without any regard to the value they may happen to bear, or the causes that may effect that value. Whether malt should become dear or cheap, and from whatever cause, whether grinding should become dear or cheap, and from whatever cause, the contract was intended to remain exactly the same. It was never meant to have any modifications to suit such contingencies. All possible contingencies were risks within the contract. They could not be foreseen; they were in fact innumerable; but the parties were contented in general to take their chance of them all, and bind themselves absolutely to give in exchange to each other, the one his quantity of malt, the other his quantity of grinding. If then the defender should deliver less than the stipulated quantity of malt, or demand something more than the grinding in return for it, because malt has become dear from any cause, that is in truth a violation of the contract, since it provided and intended to provide, that though malt became dear, the same quantity of it should be delivered for the same quantity of grinding.

This cannot be denied in general; and there is no reason why any exception should be admitted when malt becomes dear by the effect of a revenue statute, more than by any other cause. There is no appearance of such an exception in the contract of thirlage; on the contrary, the parties on both sides plainly take their chance of all events, whatever their nature may be. They did not foresee this perhaps; but neither could they possibly foresee a thousand events that have had, and may have, similar effects. Bad and good harvests, changes in the mode of husbandry, facilities or difficulties of importation or exportation, the increase or diminution of population, war and peace, distillery bills, and legislative

legislative measures of various sorts, may affect, and have affected, the price of malt just as much as a tax on making it; yet it never was imagined that these could justify a departure from the terms of contracts like this.

Nor have such contingencies only raised the price of malt, they have lowered it also as often. In particular, bounties on importation have done this in a way that forms an exact counter-part to the effect of taxation; yet the defenders never thought that they were bound to give more than the stipulated multure when this happened.

No instance can be produced in which our courts have interfered to alter the conditions of contracts *de futuro*, on account of mere hardship arising from contingent events. All such contracts contain a general undertaking of the risk of all events, at least of all which do not render performance impracticable. The business of a court of justice is to enforce them, not to alter them, according to the change of circumstances. This accordingly is notoriously the practice of our courts in regard to all contracts of feu, of tack, of annuity, of service,—White against Baillie, 29th Nov. 1794, and of sale *de futuro*. It is the rule, too, even in the English courts of equity,—See Fonblanque's Treatise of Equity, p. 122, 123, and 364.—Rudiments of Law and Equity, p. 37.—Brown, Parliamentary Cases, 395.

The case of M'Lelland, 27th Jan. 1795, is not only a decision on the general doctrine, but is exactly similar to the present in the circumstance of taxation.

In the next place, there is no provision implied in the statutes in favour of the defender's claim; on the contrary, the clause in the act of Queen Anne, giving, *per expressum*, an allowance of this sort to persons paying rent, sufficiently shews no general rule of that sort was held to be implied, *exceptio firmat regulam in casibus non exceptis*.

The statutes, with that only exception, simply impose the tax without any regard to the consequences. They are clearer in this respect than the statute that was so interpreted in the case of M'Lelland. Other revenue statutes have contained similar and more extensive exceptions; but all these express clauses shew that no such provision was held to be implied when not expressed. Besides the case of M'Lelland, which is in point, the general practice of our courts is no less decisive in regard to the interpretation of such statutes than to that of contracts; none of the statutes imposing taxes or bounties can be shewn to have received such an interpretation in relation to feus, tacks, sales, or contracts of any kind, notwithstanding the vast number of such statutes, and the innumerable multitude of contracts affected by them.

II. The defenders plea rests on the idea, that the price of malt is really raised both to the defenders and pursuers to the full amount of the tax. But this is an error founded on a superficial view of the subject. For it is a known principle of political science, that a tax which raises the price of any of the necessaries of life, raises the price of labour in the same proportion, and consequently that of all other commodities as well as that one which is taxed,—that is to say, it lowers the value of money in general. This must accordingly be the effect of the tax on

malt. If it raise the price of malt, it must raise the price of other things also, that is, lower the value of money in the same degree. This is confirmed by comparing the prices of malt and of wheat before and after the imposition of the various taxes on malt. —See *Combrune.*—See Prices at the Corn Exchange. In this way, the pursuers, though the malt they receive bears a higher money price than it did before the tax was imposed, yet are not any richer on that account, because money bears a smaller value, and consequently this larger price will buy no more than the smaller price would buy before. The pursuers, therefore, are not *locupletati* by the tax; and cannot be bound to pay over any thing to the defenders. At any rate, it must operate in this way to a certain degree; and therefore the pursuers are not *locupletati* by the whole amount of the tax, nor can it exactly be said how much.

In the last place, it will be observed, that the value of the grinding has been raised by taxation as well as that of the multure, since all the materials of the mill have been taxed. But if allowance is to be given for the effect of taxation, this must form a set-off against the demand of the defenders; for it would be unjust to give an allowance on this ground to one party in a mutual contract, and deny it to the other. It is indeed not easy to ascertain the amount of the counter-claim; but that only shews the impracticability of regulating the effects of contracts by continual interferences of courts upon the variations of circumstances.

Argument for the defender.

I. In the *first* place, the contract of thirlage was by no means a contract of hazard; on the contrary, when the parties substituted multure in kind for multure money, they discovered an obvious intention of avoiding hazard by removing that which they saw resulted from fluctuations in the value of money. The hazards resulting from bad or good seasons, and such other natural causes, they must have had in view, and could not obviate, nor was it necessary, since such hazards in course of time compensate each other, and produce a fair average. But the risk of an act of the legislature inverting, by neglect, the rights of private parties without any advantage to the public, they certainly could not have in view; they must have supposed there was no such risk. An equitable interpretation of the contract must therefore relieve the defender against the effect of such an event. What distinguishes this event from other events affecting the price of malt, is this circumstance, that the risk of these events was within the contract, but the risk of this event was not.

It never has been the practice of courts merely to enforce contracts according to the letter, but to give them an equitable interpretation according to the true intent of the parties. The exercise of this equity is a great branch of jurisprudence, and many rules are laid down in it by our writers. Nor has it been the practice to refuse relief by this equity against hardship arising from supervening circumstances, unless the risk of these circumstances was a risk within the contract. The passages quoted by the pursuer allude to this latter case only. But in cases like the present, the courts both of Scotland and England have a different rule. See case of M'Kenzie, 12th January 1695, *Fountainhall*;—and English cases, Brewster against Kitchel, *Salkeld*, p. 198, and *Carthew*, p. 439.

p. 439.—Hopwood against Barefoot, vol. ii. Modern Reports, p. 238.—Bradbury against Knight, *Douglas's* Reports, p. 624. In all these cases the Judges of England were clear, that even where payment was expressly stipulated to be without deduction for taxes, yet, if a future tax should be imposed, of a nature quite different from any that existed before, allowance must be given for this tax; but in this case, no tax at all on malt existed at the date of the contract of thirlage. The practice relative to leases and feus, &c. is not in point; for, in these contracts, the supervening circumstances, occasioning hardship, have either been within the risk of the contract, such as the fall in the value of money, or the effect of them has been so remotely consequential, that it could not found an equitable claim, and, besides, so imperceptible and uncertain, that it was impracticable to give redress. But here it is quite direct; and the amount of it is quite clear.

But, *secondly*, the equitable interpretation of the statutes is in itself, independently of the equitable interpretation of the contract of thirlage, fatal to the plea of the defender. When the legislature impose a tax on any commodity, they always mean to impose it ultimately on the consumer; for the convenience of the Revenue, they sometimes take it immediately from the manufacturer or dealer; but then it is understood and intended, that the manufacturer and dealer shall relieve themselves by taking repayment from the person to whom they dispose of it, till, at last, the burden of the tax rests upon the consumer. It is clearly the intention of the legislature that this shall happen in all cases. It accordingly happens almost universally by the ordinary course of trade; and, looking to this, the legislature must be presumed to have taken for granted that it would happen in all cases, with the exception of cases expressly provided for. Parliament never could mean that, in any case, it should rest, without relief, upon the manufacturer or dealer, or that the amount of the tax, paid by the consumer, should be intercepted by a person who had not advanced it. The present, however, is a case where the operation of the ordinary course of trade is obstructed, and is not sufficient for giving that relief to the person primarily advancing the tax which the statute intended he should receive. In this case, if the contract and statute be strictly interpreted, the tax will be received by a person who never advanced it; and the person who has advanced it remain without relief. It is necessary, therefore, for a Court of equity to interfere, in order to give a full execution to the true meaning and intent of this statute, by compelling that person to pay it over to the manufacturer, or person who has advanced it to Government.

Equitable extension of laws in this way is equally agreeable to the principles of the Roman law, Pandect. l. 12 and 13, *de legibus*;—of the English law, Blackstone, vol. iii. page 430, and of our own. Thus the act 1695, ch. 24, relating expressly to apparent heirs, was extended to heirs entering *cum beneficio*. The act 1661, ch. 24. relating expressly to creditors doing diligence against real estate, to creditors doing diligence against personal estate. The act 1661, ch. 62. in the same way, though expressed in favour of posterior apprisers, has been extended in favour of personal creditors and heirs of entail; and, though expressed against apparent heirs, it has been extended against presumptive heirs. Farther, though

though expressed only as to expired apprisings, it has been extended to apprisings during the currency of the legal.

The maxim, *exceptio firmat regulam in casibus non exceptis*, has no sort of application here. For there is no general rule in the statute from which the provision relating to rent is an exception; on the contrary, it is a provision for the purpose of explicating the general rule, that the tax shall not rest ultimately on any person but the consumer. The case of thirlage, though it may not be included under rent, is yet so exactly analogous to it that it is utterly impossible to suppose that the statute meant to make any distinction between them.

As to the counter claim of the pursuers, it is too indirect and uncertain to be regarded. If a direct and definite tax had been imposed on grinding, that would certainly have afforded a fair claim for relief to the pursuer; but the remote effect of taxes, of quite a different nature, cannot be taken into consideration; at any rate, it is more than compensated by the indirect effect of the very same revenue statutes, on which he founds, in enhancing the price of malt. These fall more heavily on the grower, and the maltster, than on the miller, and must have an indirect effect much greater on the price of malt than on that of grinding.

II. The argument of the pursuer, on this point, proceeds on *postulates* that cannot be conceded; and, though they were, still it is erroneous. It cannot easily be supposed that a rise even in an ecessary of life would raise the price of labour, while the demand for labour, and the quantity in the market remained the same. A scarcity raises the price of necessaries, but not that of labour. Then malt liquor is not a necessary of life even in London, far less in Scotland; and it is particularly observed by Adam Smith, vol. iii. page 282, that a tax on it does not raise the price of labour. But, further, if the price of labour were raised by the rise on malt occasioned by the tax, this rise on the price of labour must operate on malt itself, as well as on other things; so that it too would be raised in the same proportion as other things, by a secondary rise over and above the first effect of the tax. The price of it would still therefore bear the same proportion to other things that it did before, after deduction of the whole rise of price occasioned by the tax. The pursuers then receiving their multure in malt, after they have repaid to the defenders the tax advanced on it, will still have the same value, in all respects, that they would have had if the tax had not been imposed; so that if they do not repay the tax advanced by the defenders, they are clearly *locupletati* to that amount by the operation of the statutes imposing this tax. The accounts of prices of wheat and malt, when accurately examined, will be found to afford an inference exactly contrary to that drawn from them by the pursuers. They shew, so far as can be judged, that the price of malt was increased by the full amount of the taxes on malt, while that of wheat was not affected by those taxes.

The majority of the Court adopted the reasoning of the defenders argument upon the interpretation of the statutes; and upon that ground principally rested their opinions in favour of the defender. They disregarded altogether the argument of the pursuers on political economy.

The

The minority adopted the argument of the pursuer on the interpretation of the contract, and of the statute, and thought that the argument as to price was good, at least to some extent.

On advising the first reclaiming petition for the defender, with answers, the Court " Adhered to the interlocutor of the Lord Ordinary."

The defender presented a second reclaiming petition, which was answered. On advising this petition and answers, a hearing in presence was ordered; and, after the hearing, the judgment of the Court was: " Alter the interlocutor complained against; repel the reasons of advoca- " tion; and remit the cause simpliciter to the Sheriff."

Against this judgment the pursuers presented a petition, which was answered.

On advising this petition, and answers, the Court finally adhered to the interlocutor complained of.

Lord Ordinary, *Justice Clerk.* Act. *Jeffrey* et *Forsyth.* Alt. *Cranstoun.*
Jas. Adamson and *Thos. Scotland*, W. S. Agents. *W.* Clerk.

M.

No. XL. *May* 18. 1808.

Rev. Dr ALEXANDER HUTCHISON,

AGAINST

JOHN NAISMITH.

Reparation.—*Publication not necessary to warrant an action of damages for injurious and defamatory expressions in a letter.*

THE pursuer and defender resided in contiguous properties; and, from various causes, there existed a considerable degree of mutual irritation.

The defender had set to the pursuer a stable and an open shed connected with it. In winter 1803, the pursuer subset these premises to Mrs Mitchelson. This lady obtained permission from the defender to put doors on the shed, provided they became the property of the defender at the end of the term. These doors having been put on; and at the end of the term, Mrs Mitchelson having removed, the pursuer, under a misapprehension that they belonged to her, took down the doors, and laid them aside, till he should receive instructions from her with regard to them. At Whitsunday 1804, the term of the pursuer's removal, the key

of the stable was sent to the defender by a servant, who being required to deliver the key of the shed also, said, that the doors, with their locks and keys, having been put up, were likewise taken away by Mrs Mitchelson.

Whereupon the defender addressed (19th May 1804) the following letter to the pursuer:

"Reverend Sir,

"You sent a message by your church-officer, Thomas Leiper, to "Mrs Naismith, on the 16th, importing that there were no lock or doors "on the shed; that Mrs Mitchelson, who put on the doors, had taken "them away. I find this is as false as many of your other assertions. "Mrs Mitchelson has assured me that she was not in the knowledge of "the doors being removed; and was much surprised to see that they "were gone when she rode past the place on the 17th; and she has now "given me authority to recover these doors and padlock, and use them "as Mrs Naismith's property.

"As there is good ground to believe that you have feloniously car-"ried them off, if you will restore them in their former situation, you "will save me the disgustful task of exposing you to the ignominy which "your conduct has deserved. I am," &c.

(Signed) "JOHN NAISMITH."

"*P. S.* I must remind you to keep up your poultry."

The pursuer answered, (25th May 1804.)

"Sir,—Yours of the 19th came to my hand only yesterday. Leiper "must either have mistaken my message to Mrs Naismith, or he must have "been misunderstood. The message was, that I had taken off the doors "of the shed, as they belonged to Mrs Mitchelson, and laid them by, to "be at her disposal. Of this I gave her information by letter on the "15th current; and whenever I receive her orders, they shall be dispos-"ed of accordingly. As to the falsehoods and felonies you allege upon "me, they are wholly unfounded, and below my notice, till you think "fit to publish them. Your tongue or your pen will not blot my cha-"racter. Wishing you a better temper, I am," &c.

(Signed) "ALEX. HUTCHISON."

And the defender replied, (May 29th 1804.)

"Reverend Sir,

"I thank you for the pious wish you expressed for the amend-"ment of my temper, as well as for the pains you have taken to try it. "By your own confession, the felony is established, which you say I "have without foundation alleged, having owned that you carried off "the property of another, without the knowledge and consent of the "owner. I am equally well founded in charging you with falsehoods, "of which I have ample proofs. With respect to the last, there can be "no misunderstanding. Having ground to doubt the truth of the mes-

"sage

" sage you sent by Thomas Leiper, he was made to repeat it; and " after I had written it *verbatim*, he subscribed it. You may get Lei- " per to father the falsehood for you; but it will be a falsehood, whe- " ther it be below your notice or not. Your character cannot be blot- " ted except by your conduct; and I hope my tongue and pen will " never be employed in the base office of injuring the feelings and " character of an innocent person. Perhaps I might think it my duty " to tear the sheep's clothing from an wolf, but in the present case that " is done to my hand; and when you make restitution of the doors " and padlock, I have done with you. I shall therefore take a final " leave, with returning my wish for your amendment."

These letters were not published, nor was the defamatory matter contained in them uttered in the presence of any person. The pursuer raised an action, concluding for damages and reparation; and " That " the said letters are slanderous and defamatory; and the said John " Naismith has been guilty of slander, defamation, and injury against " the pursuer, crimes for which he is highly punishable, the more " especially where those are committed against a minister of the gos- " pel."

The Lord Ordinary (Cullen) pronounced (Nov. 19. 1806) the following interlocutor: " Finds, That as the present action is chiefly found- " ed on two letters, the one dated from Hamilton, 19th May 1804, and " the other from Hamilton, 29th May 1804, both which the defender " acknowledges to have been written to him by the pursuer, it is there- " fore unnecessary to involve the parties in any proof; and in respect " the said letters, written in the most cruel and intemperate terms, and " manifestly tending, without any ground or reason, to wound the pur- " suer's mind, and vilify his character, and destroy his usefulness as a " minister of the gospel; Finds the letters highly injurious and calum- " nious; and such as thereby fully entitle the pursuer to reparation; and " therefore finds the defender liable to the pursuer in the sum of L.50 " Sterling of damages and solatium; and farther, finds the defender " liable in expences; and allows an account thereof to be given."

The case came by petition and answers before the Inner-House.

Argument of the defender.

The letters libelled on never having been published, but having been sent privately to the pursuer himself, do not afford any ground for an action of defamation. A design to injure and defame is indispensible to support an action of defamation; and of this design, activity in publishing, and a malicious industry in circulating the injurious charge, is the evidence which the law requires. In the present case the defender has neither been guilty of an intention to defame, nor of actual defamation; and the letters have reached the public only through the means of the pursuer himself.

Argument

Argument of the pursuer.

The action concludes for damages arising from an injury *sui generis* as well as from defamation. For every wrong there is a remedy; and the law provides redress, not only against wounds or violence committed on the body, but for those inflicted on the mind, and publicity of commission, however it may aggravate, is as little required to constitute any injury in the one case as in the other. Accordingly damages were awarded for injurious expressions contained in a silent letter, and so conveyed to the person injured, Carter against Crichton, 1778 (not reported.) To any man, but more particularly to a clergyman, the charges of falsehood, felony, and hypocrisy, are injuries of the most painful and aggravated nature.

The Court agreed in opinion with the Lord Ordinary, a very serious injury had been inflicted on the pursuer, whose feelings on the subject of character, from his sacred function, is entitled to the peculiar protection of the law.

On advising a reclaiming petition and answers, (18th May 1808) the Lords adhered.

Lord Ordinary, *Meadowbank.* Act. *Ad. Gillies.* Alt. *Jas. Moncrieff.*
Ar. Millar, W. S. and *Jo. Granger*, W. S. Agents. *F.* Clerk.

J. W.

No. XLI. *May* 20. 1808.

FORD,

AGAINST

HILLOCKS.

TACK.—*The tenant of a mill and lands cannot, without consent of his landlord, establish thereon a manufactory or machinery foreign to the purposes of his lease.*

HILLOCKS possessed the corn-mill and mill-lands of Finhaven under a lease containing, *inter alia*, the following clause, "And "at all times the said David Hillocks is at liberty to have three or four "cottars or small subtenants on the said possession, including a miller, "but never more." Further, the proprietor of this estate had established a system of regulations which all the tenants, and among the rest Hillocks, subscribed on receiving their leases. By these regulations the landlord

landlord " and his foresaids reserve to themselves the unlimited use and " exercise of all roads, mosses, marked stances, mill-dams, and mill-leads " presently used, and the liberty of making such alterations upon them " as may be thought necessary for the public good, without any allow- " ance or abatement to the tenant whatever."

The defender proceeded to cut an aqueduct, for the purpose of erecting, immediately adjacent to his corn-mill, a plash-mill, from which he was to derive a rent of L. 35 *per annum*. Whereupon Ford applied to the Sheriff of Forfarshire for an interdict, who pronounced the following interlocutor: " Finds a tenant's right in lands is limited to the fruits " which spring from them; and that he has no right to break up ground " for the purpose of erecting or conveying water to a plash or yarn-mill " unconnected with the purposes of a farm."

Of this interlocutor the defender pursued an advocation, which was discussed before Lord Meadowbank, Ordinary. In consequence of an order by his Lordship, " to condescend on the precise nature of the con- " struction he wishes to erect below his corn-mill, the quantity of water " to be made use of, and the alteration of the stream (if any) it may " require;" the defender condescended, 1*st*, That the machinery was to be extremely simple, and to consist of little more than a single mill-wheel, and the pieces of wood which are made to move by the operation of that wheel and wash the yarn; that the whole strength to be employed was not to amount to more than one half of a horse's power; and that there would not be more than two or three roods of masonwork: 2*d*, That the plash-mill was to be placed beside the corn-mill, and was to be supplied by a small cut from the lead of the corn-mill, of no more than two feet three inches deep of water; and that the supply of water to the corn-mill would not thereby be perceptibly affected: 3*d*, That no alteration would be made on the dam-dyke of the stream, or in any respect on the stream itself from which the corn-mill was supplied. A sketch, illustrating these statements, was at the same time produced.

The Lord Ordinary then pronounced the following interlocutor:

" Having considered this condescendence, with the answers thereto, and " the proceedings; and being of opinion that the operation proposed in " the condescendence, and delineated on the sketch, is within the powers " competent to the advocator under his lease, he always constructing " such a sluice on the intended lead to the plash-mill as to stop the is- " suing of water from the corn-mill lead, as often as the service of the " sucken shall require it, advocates the cause; and on his finding cau- " tion to remove the construction at the issue of the lease, and place " every thing *in statu quo*, if so required, recals the interdict; and au- " thorises him to carry the intended operation into execution at the " sight of who is hereby directed to report to the Lord " Ordinary, when the same is finished, agreeably to the condescendence " and sketch."

The case then came before the Court by petition and answers.

The pursuer, besides an argument on the amount and nature of the inconvenience or nuisance which the proposed mill would create on his property, maintained, that he could not by law be compelled to enter into a discussion with his tenant respecting the degree or extent of the innovation which the latter intended to make on the subject let to him. The subject let was a corn-mill and mill-lands; and the defender is not entitled to make any alteration on it, unconnected either with the grinding of corn or the cultivation of land. It might even be questioned how far the tenant can, without the landlord's consent, make any great alteration for the obvious improvement of either of these objects. But, *a fortiori*, the tenant is not entitled to change the nature of the subject let, and to create a new one, altogether foreign to the purposes of the lease, and inconsistent with the meaning and object of the contract between the parties.

While the tenant is entitled to derive from the lands all the advantages from increasing skill and improvement in cultivation, he cannot render them subservient to other and opposite purposes. He cannot break them up to form aqueducts, nor cover them partially or totally by constructing houses for machinery or workmen. Further, the tenant is not entitled by his lease to use, for any purpose but that of his corn-mill, the water already drawn from the river. Much less is he entitled to draw, for such foreign purpose, any additional quantity,—otherwise he would be using a subject which is not let to him. If these general principles of law required any aid, it might be further pleaded, that the landlord, by the clause in the regulations, had reserved to himself the exclusive power of making mill-dams, &c.

In a word, the right of a tenant is of an inferior description to that of a usufructuary, who cannot make any material alteration on the subject, *L.* 44. § *de Usufructu.*

On the other hand, the defender did not dispute the general doctrine, that the tenant was not entitled to change the nature of the subject let, and altogether invert the object and purpose of the lease; but maintained, that a tenant cannot be prevented from accomplishing by machinery any work which he is entitled to carry on by the hand-work of his servants. He might, without consent of his landlord, erect a thrashing-mill, or a corn-mill for his own use. He might sow flax on his lands, and carry on, by the work of his servants, the process from its original production to its fabrication into cloth. It would be absurd, therefore, to prevent him from availing himself of machinery to accomplish what he would be entitled to do by other means. The tenant being thus entitled to construct a mill, it would be impossible to inquire into or discriminate the property of the different parcels of yarn which were put into it; and the landlord being thus compelled to admit the erection of the mill, can qualify no interest or title to prevent it from being constantly used.

Some of the Judges agreed in opinion with the Lord Ordinary, and thought that the principle of the Sheriff's interlocutor was too broad and unqualified for the law to sanction: that there were rights of inhabitancy, and

and consequently of manufacture, which seemed to be struck at by it; that the operation in question, if accomplished *bona fide*, was *innocuae utilitatis*, and might be sanctioned; and that, in law, the tenant has right to every use of the subject let, which shall not invert its nature, and render it less valuable.

On the other hand, a great majority of the Judges were of a different opinion; and thought that a tenant was not entitled, either partially or totally, to change the nature of the subject let, or to create a new one by the erection of the mill; that the tenant in this case must restrict himself to those uses of the subject connected with the grinding of corn, and the cultivation of the land; that it would be contrary to the *bona fides* of the contract to permit a tenant to convert the subject of the lease to a purpose different and altogether unconnected with that for which rent was stipulated; and that he had no right to the stream of water, excepting for the use of the corn mill. A case too was noticed, where the tenant was found not at liberty, without the landlord's consent, to improve the subject by additional building, 22d July 1778, Inglis against Balfour*. One of the Judges rested his opinion both upon these general principles

* The case here referred to is somewhat involved in specialties, and is not reported. But as it was noticed on the Bench, and as there are few decided cases on this subject, it may not be improper to state the circumstances in which it occurred.

In the year 1757, Gavin Hamilton, bookseller in Edinburgh, obtained from Mr Inglis of Pedhall a lease for 57 years of a paper-mill, with about six acres of ground, and a house adjacent to the mill, containing some accommodation requisite for the manufacture, as well as for his family, and for those whose business it was to overlook the workmen. In this lease was contained, *inter alia*, a prohibition on the tenant, "*to break* "*or open the ground for any other purpose than that of tillage, or pasture, or building* "*houses or other conveniencies thereon.*"

In the year 1761, Mr Hamilton obtained from Mr Inglis, under a lease to expire at the same time with the former, another dwelling-house, "*with a little plot of ground,* "*consisting of about 48 square yards, on the east side of, and adjacent to the said house,* "*intended as a flower-plot.*" This was all the ground which adjoined to the house; but the lease contained likewise a park of about 16 acres, at a short distance from it.—This house and park were altogether detached from the house and mill held under the former lease; and it was provided, "that the tenant shall not be at liberty to break "open the ground for any other purpose than that of tillage or pasture, nor set up nor "use any brick-kiln or lime-kiln within the grounds of the said lands, without licence "had and obtained from said George Inglis or his foresaids for that effect."

To these leases Mr Balfour obtained right by assignation, after the death of Mr Hamilton; and as, from the extension of the manufactory, the accommodations of his dwelling-houses were insufficient, he resolved to enlarge that dwelling-house which was detached from the mill, and held under the separate lease already mentioned. The only area, however, on which the proposed addition could be placed, was that which was described in the lease as *consisting of 48 square yards, on the east side of and adjoining to the said house, intended as a flower-plot.*

Mr Balfour having taken measures to commence the building, Mr Inglis applied to the Sheriff for an interdict; and, after some procedure, the case came before the Court of Session by advocation. The Lord Ankerville, Ordinary, after inspecting the premises, found, "That the defender, Mr Balfour, has a right to proceed in carrying on "his intended building, according to the plan and account of dimensions now given into "process."

The pursuer reclaimed, and pleaded; 1*st*, That, the area on which the addition was to be placed, was, by the terms of the lease, and the understanding of parties, set apart for a flower plot, and could not be converted to any other purpose. 2*d*, That, independently

principles adopted by the majority, and upon that clause of the regulations by which the landlord had reserved to himself "*the unlimited use* "*and exercise of all roads, and mill-dams, and mill-leads.*"

The Lords altered, and remitted simpliciter to the Sheriff.

Lord Ordinary, *Meadowbank.* Act. *Ad. Gillies.* Alt. *J. W. Murray.*
Robinson & Ainslie and *Tho. Renny*, W. S. Agents. *W.* Clerk.

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pendently of this special provision of the lease, a tenant cannot change the nature of the subject let under a lease of lands; the tenant must cultivate according to the rules of husbandry, and the practice of other tenants, but he has not right to any thing that is *pars soli*, to growing timber or minerals. He has the right *utendi non abutendi.* He cannot do any thing which may impair the value, or alter the nature of the subject. Under the lease of a house in like manner, he has right to all the accommodation which it affords, but he cannot change its specification, or, in any degree, alter its nature and description, by enlarging or diminishing it. This is a power which a proprietor only can exercise. L. 44. ff. *de Usufructu.* The Court altered the interlocutor of the Lord Ordinary; and found that, "The defender, John Balfour, has no right to change the "nature of the subjects in dispute; and that he is not entitled to carry on the buildings "in question, but that he must possess the piece of ground in dispute in the same man-"ner as it was possessed by Gavin Hamilton his author, and according to the original "understanding of the parties." And on advising a reclaiming petition with answers, the Lords adhered. 22d July 1778, Inglis against Balfour.

J. W.

No. XLII. *May* 24. 1808.

JOHN REID, JOHN BURNET, and Others,

AGAINST

JOHN and ANDREW NEIL.

BURGH ROYAL.—POLICE.—*The act of the Town Council* 1785, *relative to the buildings in Edinburgh, applies also to those within the new Extended Royalty.*

ON the 14th February 1781, an act of the Town Council was passed, regulating the height of the buildings in the New Town of Edinburgh. This act was enlarged and explained by certain other acts in the year 1784, and on the 29th June 1785. By these it is enacted, That the Streets interjected between, and running parallel to, the great Streets of Prince's Street, George Street, and Queen Street, "shall not exceed "two

" two stories, exclusive of the sunk and garret story; and that no floor " shall exceed eleven feet in height, including the joisting and floor, at " least that the whole height of the side wall, from the floor of the sunk " story, shall not exceed 33 feet."

The lot of ground now occupied by Clyde Street, lying on the south side of York Place between St Andrews Square and Elder Street, was originally, according to the plan adopted by the Town, intended to be occupied by courts of stables and offices.

The pursuers, certain proprietors in York Place, thought it would be more advantageous to their properties if a certain portion of this lot were added to the back ground attached to their houses, and the remainder were occupied by houses similar to those in Thistle Street and Rose Street. The original plan was abandoned. The whole lot on which Elder Street and Clyde Street stand was exposed to public sale; and was purchased by the pursuer, Mr Reid (7th May 1800.) In the articles of roup, no limitation is imposed on the height to which the houses in Clyde Street might be raised. The 5th article stipulated, " In order to " prevent any deviation from the mode of building hereby laid down, " it is agreed that, before any building is begun on any of the streets, " or lanes, the purchaser, or purchasers thereof, shall produce to the " Lord Provost, Magistrates, and Council, an elevation of the building " intended to be erected on any of the said streets, or lanes, to be by " them approved of; and which elevations, if approved of by the said Lord " Provost, Magistrates, and Council, shall be signed by the Lord Provost, " or preses, and the purchaser; and when so approved of, the same " shall not, in any particular, be departed from, without the express " consent of the said Lord Provost, Magistrates, and Council had and " obtained for that purpose in writing."

Mr Reid retained part of this lot, on which he built the north side of Clyde Street; and conveyed to Mr Young the southern part of the lot.

The defenders, John and Andrew Neil, acquired this southern lot from Young; and gave in a plan and elevation of their intended buildings, in which they proposed to construct houses of 43 feet in height, and consisting of three stories, besides attic and sunk stories. The plan was approved of by the Lord Provost and Magistrates (29th July 1807.)

The defenders then applied to the Dean of Guild, who permitted them to proceed to build according to their plans and elevations.

Against this deliverance, the pursuer, Mr Reid, who was proprietor of the north side of Clyde Street, and certain persons, proprietors in York Place, presented a bill of suspension and interdict: And the case came to be discussed before Lord Robertson, Ordinary.

The pursuers maintained that Clyde Street was merely a continuation of Thistle Street; and must be regulated by the act of Council 1785, which restricts such streets to the height of 33 feet. This act of the Town Council is still in observance, (17th February 1803, Campbell against Lindsay.)

The defenders maintained, that the act of Council was passed for the regulation of that part of the New Town included between St Andrews Square and Charlotte Square, Queen Street, and Princes Street, built according to the plan furnished by Mr Craig; and had no reference to future plans, to which it might be totally inapplicable.

The Lord Ordinary pronounced the following interlocutor, (23d Jan. 1808,) "Finds that the areas on which the houses in dispute are building, were purchased by the suspender, Mr Reid, in May 1800, and were conveyed by him to Mr Young, from whom Messrs Neil derive right; finds that there is no limitation as to the height of the houses to be built on said areas, either in the articles of roup, under which Mr Reid purchased, or in any of the subsequent conveyances thereof; farther finds, that the Messrs Neil are not restrained, by the general regulations established by the Town Council of the City of Edinburgh, as to buildings in the Extended Royalty, from raising the side walls of the houses in question to the height which they propose, in respect that the act of Council, of date 29th June 1785, on which the suspender founds, as limiting the height of the side walls to 33 feet, does not appear to the Lord Ordinary to apply to Clyde Street, which was not a part of the plan of the Extended Royalty in the year 1785, when that act of Council was passed; and it does not appear to have been the intention of the Lord Provost, Magistrates, and Council of Edinburgh, and Governors of Heriots Hospital, by whom Clyde Street was feued, to subject the houses to be built in that street to the limitations imposed by said act of Council, as none such are imposed either *per expressum*, or by reference to the said act; therefore, finds that John and Andrew Neil are at liberty to build the walls of the houses in question, in the manner specified in the deliverance of the Magistrates and Council of the City of Edinburgh, of date 29th July 1807; repels the reasons of suspension."

The Court, however, were of opinion that the act of Council 1785 applied to Clyde Street; that the proposed buildings must be restricted to 33 feet in height; and that the act of Parliament, while it authorised the still further extension of the Royalty, must be understood at the same time to have carried along with it, and to have imposed, all those existing regulations touching the police of building which had been previously established.

The Lords (24th May 1808) altered the interlocutor of the Lord Ordinary; and found that the regulations in the acts of Council of the 14th February 1781, the 15th of September 1784, and the 29th June 1785, extend to the buildings in question,—Therefore altered the interlocutor reclaimed against, and found that the respondents cannot raise their buildings higher than is allowed by the fourth clause of the regulations of 29th June 1785, and remited to the Lord Ordinary to adjust the plan of the buildings, agreeable to these regulations, and to do farther in the cause as to his Lordship shall seem just.

Lord Ordinary, *Balmuto*. Act. *Advocatum*. Alt. *Rob. Forsyth*.
Will. Johnstone and *Nath. Grant*, Agents. *M.* Clerk.

J. W.

No.

No. XLIII. *May* 25. 1808.

ROBERT BROWN and Others,

AGAINST

The COUNTESS of DALHOUSIE.

TAILZIE.—*Clause ineffectual to prevent an alteration in the course of Succession.*

ON the 12th September 1701, Thomas Brown, Esq; executed an entail of the lands of Eastfield on a certain series of heirs. The prohibitory clause was expressed in the following terms: "And likewise it is hereby expressly provided and declared, that it shall be nowise leisome, and left unto any of my said heirs of tailzie and provision above specified, to sell, alienate, and dispone the lands and others above written, or any part thereof, either irredeemably, redeemably, or under reversion, or to grant wadset infeftments to burden the said lands with any servitudes or other burdens, or to set tacks or rentals for any longer space than the setter's lifetime or interest, or for any other duty than the ordinary duty payable for the same; neither shall it be lawful for them, nor in their power, to contract debt, nor do any other deed whereby the said lands and others foresaid, or any part thereof, may be apprised, adjudged, or any manner of way evicted, in prejudice of this present tailzie, or of those who, by virtue thereof, shall be then to succeed."

The irritant and resolutive clauses were of the following tenor:

"And if the said heirs of tailzie and provision shall do any thing in the contrar of the aforesaid provision, by disponing or contracting debts, or doing any other deed, the said debts, and all others, and every one of them, shall not only be void and null, in so far as concerns the lands and others hereby disponed, so they shall not be affected herewith in prejudice of the said heirs of tailzie and provision who are to succeed, seeing thir presents are granted *sub modo*, and with the provisions above specified; but also the contraveners for themselves, and the descendants of their body, shall admit and forfault their right and interest in the lands and others above disponed, and the same shall be devolved upon and pertain to the person who shall be next, and have right to succeed thereto by virtue of this disposition, free from all debts and deeds done, contracted, and committed by the contraveners."

The deed of entail was regularly recorded and compleated. It was the investiture under which the successive heirs made up their titles, and possessed the estate.

On the 4th June 1794, Charles Brown of Coalston, having compleated his titles as heir of entail of this estate, executed a disposition in favour of himself, and the heirs male of his body, whom failing, to the heirs *whomsoever* of his body, whom failing, to certain other substitutes

stitutes, thus altering the order of succession under which the estate had been taken up.

In the year 1800, Mr Brown died without heirs male of his body; and his only daughter, now the Countess of Dalhousie, was served heir of provision under the disposition granted by him in 1794 above mentioned, and obtained a charter of resignation on the procuratory in that disposition.

George Brown, Esq; Commissioner of Excise, the nearest heir male of Thomas Brown the entailer, obtained himself served heir male and of tailzie to the former heir; and raised an action of reduction for setting aside, 1*st*, The retour of the service of the late Mr Brown of Coalston, with the precept and instrument of sasine following thereon; *secondly*, The disposition granted by him in 1794, and infeftment proceeding upon it; and, *lastly*, The retour of the Countess of Dalhousie's service as heir of provision to her father, with the charter of resignation following on the procuratory in the before mentioned disposition; on the ground that the titles made up by Charles Brown, and the disposition executed by him, were in contravention of the deed of entail under which the estate was held, and by which it was entailed on the heirs-male of the granter.

The cause was discussed before the Lord Armadale, Ordinary, who repelled the reasons of reduction, sustained the defences, and decerned; (8th February 1805.)

The case then came before the Court by petition and answers.

Argument of the pursuer.

In questions on the interpretation of entails, a distinction is recognized between questions *inter heredes*, and those to which purchasers or creditors are parties.

The jealousy of the law, in admitting restraints on property, with the consequent strictness of interpretation in contests between freedom and restraint, in which the former is always presumed, does not arise from speculations on the impolicy of entails, speculations on which the views of mankind daily change, but has for its object the safety of commerce, and the protection of third parties from being injured by restraints in their debtors right, which they have not means to suspect or discover. Hence this reluctance of the law to presume restraint does not respect personal obligations, but only real burdens on the property.

Thus a person purchases an estate, of which the price is to be paid by an annuity for a certain period to the seller, or a person named by him. To render this a real burden on the estate, it is necessary that it be engrossed in the titles, and make a part of the investiture. If this be not done it is ineffectual; and if it be doubtfully expressed, the law presumes against it. But the personal obligation, which the purchaser has incurred to pay the price of the estate in the shape of the annuity, is subject to no such rigid interpretation, nor does any presumption in favour of liberty interfere in this case to enable him, by availing himself of inaccuracies, to escape from it. In like manner, if a person receives an estate gratuitously under a condition, that on a certain event it shall re-

turn

turn to the donor the personal obligation incurred by the acceptance of the estate, will be interpreted with as much liberality as in the case of the purchaser.

An heir of entail, especially if not *alioqui successurus*, is exactly in the same situation in relation to the other substitutes. The institute is the donee in the strictest sense of the word; and the obligation to fulfil the entailer's injunction, is not weakened, as it reaches the substitutes. Each substitute, by taking up the estate, undergoes a personal obligation in favour of the next substitute, in terms of the entail. In actions on this personal obligation between prior and posterior substitutes, in which a real burden on the estate is not contended, and the interest of third parties not involved, the principles of strict interpretation do not operate. Nor is there room for any mode of interpretation different from what governs that of every onerous contract.

From these principles, it follows that the rule of strict interpretation, which obtains with regard to irritant and resolutive clauses, of which the object is to secure against third parties contracting, does not apply to those simply prohibitory, which are effectual only in virtue of the personal obligation they create, and which bind only the heirs in possession, or their representatives.

Accordingly, our law writers recognise three species of entails. 1*st*, Simple and defeasible destinations. 2*d*, Destinations with prohibitory clauses, which create a *jus crediti* in the substitutes sufficient to prevent gratuitous alienations; but impose no real burden or limitation on the fee. 3*d*, Destinations with prohibitory, irritant, and resolutive clauses, of which the effect was to *prejudge creditors and commerce*, and which were therefore subject to a strict interpretation. Mackenzie, B. 3. tit. 8. § 16 and 17. Erskine, B. 3. tit. 8. § 23 and 24. On the principles stated by these writers, a prohibition to sell and contract debt must be equally effectual to bar gratuitous alienations; because, to lay down that *a jus crediti* is created in the substitutes by the destination, and at the same time to admit that this *jus crediti* may be precariously and gratuitously disappointed, is a legal inconsistency.

There is nothing in the terms or object of the act 1685, which dictates the application of the principle of strict interpretation to clauses merely prohibitory. By common law, a person might destine his estate with the protection of prohibitory clauses; and effectually adject to his gift, any reasonable and not immoral condition, which, by acceptance, the heir incurred a personal obligation to fulfil; nay, before the statute, it appears that by the addition of irritant and resolutive clauses, a real *nexus* on the estate, effectual against creditors and purchasers, might be created in favour of the heirs, (26th February 1662,) Stormont. But as doubt was entertained on this point, the act 1685 was passed.

From the preamble, and the various regulations, it is clear that the statute had in view only those entails which were to be effectual against third parties; and that while an observance of the rules therein dictated was necessary to render an entail effectual against onerous parties, those personal obligations on the heirs, arising from the prohibitory clauses, were left to be governed by the principles of the common law. Accordingly, an observance of the forms of the statute is not necessary to give

effect o an entail containing only prohibitory clauses, Erskine, B. 3. tit. 8. § 27. But, by unsuccessfully attempting to render this entail effectual against third parties, by the addition of irritant and resolutive clauses, the entailer is not put in a more unfavourable situation than if these had been awanting, and this entail had been of the second species.

By neglecting the requisites of the statute, and failing to create a real right in favour of the heirs, which must have precluded onerous deeds, the entail is not deprived of the support of common law, which renders it effectual against gratuitous deeds; nor can the substitutes be deprived of the benefit of the personal obligation incurred by the heir, by the acceptance of the succession so qualified.

Abandoning all benefit from the statute, and all assistance from the irritant and resolutive clauses, it is sufficient for the pursuer that this entail have the qualities of the second species, in which nothing more is required for its constitution than a distinct expression of the entailer's will. Indeed, to the effect of imposing a personal restraint on the heir, an entail may be constituted, not only without a prohibition to alter the order of succession, but without prohibitory clauses at all. Thus, where a gratuitous settlement is made on a person not *alioqui successurus*, wherein, on a certain event, there is a clause of return to the granter, this condition cannot gratuitously be defeated by the heir taking under the settlement.

This distinction between the two cases, wherein clauses prohibitory are effectual among heirs, that would not be so with third parties, has been recognized by the Court in the case of Donn against Donn, wherein the clause was *verbatim* similar to the present, and wherein the entail was created by a mere reference to the investitures of another estate; the Court qualified their interlocutor, by finding it sufficient to bar a *gratuitous* alienation.

The same was the decision on the 2d February 1728, Lord Strathnaver against Duke of Douglass, where the clause was less comprehensive than the present.

It has been said that an opposite judgment was pronounced, 8th July 1789, Stewart against Home. But in truth the case was full of specialties. The intention of the prohibition therein was to prevent the heir from selling or contracting debt, for a certain period, but not to debar him from making a rational settlement of it on his own children in his contract of marriage.

On these principles, the pursuers are entitled to a fair liberal construction of the entail; and, if such be granted, the clause in question would, beyond controversy, import a prohibition to alter the order of succession.

2d, Considering this entail, with reference to the principle of strict interpretation, admitting that to the constitution of an entail, even *inter heredes*, the three distinct modes of alienation must be prohibited; *1st*, By selling; *2d*, By contracting debt; *3d*, By altering the order of succession, and that the prohibition of the one mode does not infer the prohibition of the rest; yet the words of the clause are sufficient to include the disposition under reduction. The prohibition to sell, alienate, or dispone, reaches the deed complained of. The legal term disponee is used

used without qualification, and applies to all conveyances, gratuitous or onerous To restrict it to the latter, is to violate the rule of law respecting entails, which requires that the plain meaning of the words shall be regarded without inference either from restriction or extension. If the disposition had borne, *in gremio*, to be for a price, *ex concessis*, it would have been void. But the nature or amount of the consideration cannot alter the legal description or character of the deed under which alone the estate could be conveyed.

In the sense of law, *alienate* applies to any deed, gratuitous or onerous, *inter vivos*, or *mortis causa*, which conveys the property to a *stranger*. The word is derived from the civil law, where its meaning is defined, *L.* 1. *c. de Fund. Dot.*; see likewise Craig, *de Feud.* b. 3. D. 3. § 11. Such was the meaning of the term *alienate* at the date of the statute 1685; and the entailer himself uses it in this sense, when he says, that, by payment by himself of five merks Scots, " Thir present *letters*, " *alienation, disposition, and infeftment, shall become null*;" and that in using the terms sell, alienate, and dispone, the conveyances meant merely sell, or that in any case where many terms are used, they are to be presumed to be synonymous, is an inference most forced and improbable. On the contrary, where many terms are used in conjunction, the whole must be understood to convey a meaning which each would separately have been inadequate to express. Having prohibited under the word sell, onerous transference, the additional words alienate and dispone apply in their usual acceptation to those, whether onerous or gratuitous.

Accordingly the word alienate, coupled as in the present case with sell and dispone, imported a different meaning, and was effectual to prevent long leases. Duke of Queensberry against Earl of Wemyss.

The heirs are prohibited from doing any " *other deed* whereby the " lands may be apprised," &c. or any manner of way evicted, &c. in prejudice of this present tailzie, &c.

Technical words are not required in the constitution of an entail; and almost every stile book has a different formula; neither is it necessary to adhere to the words of the statute. It is enough that the deeds prohibited be explicitly laid down. The words in this clause are equally explicit with those of the statute, and almost identical. The only difference is, that instead of being coupled by the disjunctive particle *or*, the disjunctive particle *nor* is used.

It is impossible to maintain that the general terms, in which the latter part of the clause is expressed, must be explained by and restricted to the previous enumeration of particulars; nor can the terms *any other deed* be held, without a great violation of construction, to refer to those only of the nature of a sale, or contraction of debt, previously prohibited. But if this be the legal interpretation in such cases, it must apply with equal force, and with the same effect, to the statute 1685.

That statute did not mean in technical detail to enumerate the various devices against which it should be lawful effectually to provide, leaving the entail obnoxious to those other modes of defeat which are not there detailed. It dictated certain forms and precautions indispensible to legalize those conditions which the entailer should prescribe; and concludes,

as

as in the present case, with a general clause including all deeds tending to the defeat of the entail.

If this be the just interpretation of the statute, one of two consequences must follow. Either, 1*st*, That the statute regulates such entails only as were to become effectual against third parties onerously contracting, and leaves those in their former situation which were sufficiently secure from the personal obligation they created at common law; or, 2*d*, That the statute was intended to comprehend under two heads all the prohibitions which were necessary to give complete security to entails.

The only other supposition is absurd, viz. that while the statute meant to secure entails from defeat arising from onerous causes, it left them obnoxious to the caprice of gratuitous alteration.

The clause is equally comprehensive with those in the cases M'Laine against M'Laine, or General Ker against Duke of Roxburgh, 23d June 1807.

If, as in terms of these decisions, the prohibition of *any other deed* mean something more than is contained in the previous prohibitions, and includes eviction from a gratuitous cause, it does not admit of a doubt, that eviction has taken place in this case; because in legal language a party suffers eviction equally where possession is prevented or withheld, as when it is taken from him.

Argument of the defender.

The origin of the principle of applying strict interpretation to entails, is neither to be attributed to any ideas of the general impolicy of entails, nor to a regard to the safety of the public. It is a principle which must operate in every case of a contest between a general rule and an exception, wherein the presumption inclines to the general rule in cases of doubt. Freedom is the general rule, because it is the natural and ordinary condition of property. Restraint is an exception from that rule; and the presumption must always incline to the former from the common principles of legal interpretation—principles applying to all questions, whatever be the nature of the general rule, or of the exception.

This being the origin of the principles, it must apply without distinction to all questions, whether *inter heredes*, or to those in which onerous parties are concerned. Accordingly it is now established beyond controversy, in questions among heirs, that although the intention of the entailer be clear from the object and tenor of the deed, yet if it has not been set down in explicit terms, it will not be enforced by implication, and the *jus crediti* of the heirs may be defeated in all those events against which the entailer has not distinctly provided.

Thus a distinction is recognised in law between the institute and the heirs of entail; and where the prohibitions are not expressly directed against the former, he is considered to be free. Judgment of the House of Lords, 24th November 1769, Edmonstone of Duntreath.

The same principles dictated the decisions, 25th June 1785, Menzies of Culdares;—23d February 1791, Wellwood.

To constitute a tailzie effectual, even among heirs, three modes of disappointing the *jus crediti* of heirs must be prohibited: 1*st*, By selling.

2*d*,

2dly, By contracting. *3dly*, By altering the order of succession; and from the prohibition of any one, the prohibition of the rest cannot be inferred. In this case, the two first are effectually prohibited, but the last has been omitted, or at least not expressed with that explicitness which the law requires.

The words to *sell*, *alienate*, *dispone*, denominate one act, and characterise nothing but a sale.

The general clause, "*nor do any* other deed," &c. has an obvious reference to, and must be explained and restricted by the previous enumeration of particulars; because it is an invariable rule of law, that general words, following a specification of particulars, are confined in their interpretations to other things of the same kind with those previously enumerated, Ersk. b. iii. tit. 4. § 9. If these general expressions had stood alone, they would not have constituted an effectual entail, and the previous detail of particulars cannot extend their effect. In these cases the Court observed this rule, 9th November 1749, Sinclair against Sinclair, *Falc.* No. 92. and *Kilk.*;—15th January 1799, Bruce of Tillicultry.

This general clause, although to a certain degree co-extensive with that in the statute, has omitted certain very explicit terms therein contained. After enumerating the ways by which the entail might be defeated, 1*st*, By sale; 2*d*, By contracting debts, or doing other deed by which the lands may be apprised or evicted, it proceeds, "*or the succession frustrated or* "*interrupted.*" In the deed these words are totally omitted, and no others equivalent are substituted in their place.

In the case of Ker and of M'Laine, after the clause in the entail prohibiting sales and contraction of debt, any deed *in hurt and prejudice or in evasion* of the succession, are the subject of a distinct and separate prohibition.

The Court adhered to the interlocutor of the Lord Ordinary (25th May 1808.)

Lord Ordinary, *Armadale.* Act. *John Clerk.* Alt. *A. Campbell* et *Henry Cockburn.* Agents, *Dundas & Irving*, W. S. and *John Smith, jun.* W. S. *Buchanan*, Clerk.

J. W.

NO. XLIV. *May* 25. 1808.

HENRY VEITCH,

AGAINST

DAVID YOUNG.

POSSESSION.—SERVICE AND CONFIRMATION—HERITABLE AND MOVEABLE.—*If Books and Furniture, though rendered heritable destination, transmit from the dead to the living without service by possession.*

LORD ELLIOCK, by a deed of entail 23d February 1790, resigned his estate of Elliock, " in favour and for new infeftment to be " made and granted to myself, and the heirs whatsoever of my body, " whom failing, Lieutenant James Veitch of the 72d Regiment of Foot, " and the heirs male of his body;" and failing them to certain other heirs and substitutes therein mentioned, under the usual prohibitive, irritant, and resolutive clauses.

In the same deed, he added a clause in the following terms: " And I " do hereby assign, and make over to the heirs whatsomever of my " body, whom failing to my other heirs of entail and substitutes before " specified, not only the whole writs, title deeds, evidents and securities, " old and new, made, granted, and conceived, or which anywise can " be interpreted in favour of me, my predecessors, or authors, of and " concerning the lands and estate herein contained, with the whole pro- " curators of resignation, precepts of sasine, and all other clauses there- " in contained, with all that has followed or may follow thereupon, but " also my whole household furniture, or plenishing of whatever kind, " or denomination, which shall be within my house of Elliock at the " time of my decease, together with my whole library of books of every " kind, which shall be within my said house of Elliock, or my house " in Edinburgh, or any where else."

Lord Elliock died in July 1793; and was succeeded by Lieutenant James Veitch. Lieutenant James Veitch never made up any title to any of Lord Elliock's property by service or confirmation; but by means of persons acting for him, he did take possession of the books and furniture above mentioned *. In particular in December 1795, his sister Miss Lilias Veitch by his order (as was said), went to the house of Elliock, packed up the books and furniture, and sent them off, the first to Dumfries, the last to Edinburgh; to be forwarded to him at London.

On this, Henry Veitch presented a bill of suspension and interdict, to stop the further removal of these effects. And he also made applications

* This was disputed; but the Court were clear that it was fully proved.

tions to the Sheriffs of Edinburgh and Dumfries, to have them sent back to Elliock. These actions were removed into the Court of Session by advocation.

Previous to this, Lieutenant Veitch had sold some growing wood on his estate to David Young and others, who had accepted bills for the price, being L. 2,000. In January 1796, Lieutenant Veitch being in bad health, these persons brought an action against him to have it found and declared, that they were not bound to pay these bills till he had granted them sufficient warrandice of their right to the wood against the challenge of any subsequent heirs of entail in the estate of Elliock; or, if the bills were indorsed away, to have him decerned to grant such warrandice.

On this depending action, they (6th January 1796) arrested the furniture in the hands of Miss Veitch at Edinburgh, and the books in the hands of Crosbie and Jardine merchants there, to whom Miss Veitch had sent them. Lieutenant Veitch died in the beginning of May 1796.

The books and furniture being also arrested by other persons, creditors of Lord Elliock and Lieutenant Veitch, multiplepoindings were raised by Miss Veitch and by Crosbie and Jardine, in whose hands these articles were, (30th May 1790.) These two multiplepoindings, together with the suspension and interdict, and the two advocations above mentioned, came before Lord Justice-Clerk, Braxfield, by whom these five processes were conjoined.

After a variety of proceedings, the other arresting creditors having withdrawn, on the motion of David Young, &c. the Lord Ordinary in the conjoined processes of multiplepoinding, (then Lord Armadale,) "granted warrant for letters of incident diligence, at the instance of all "parties interested, against havers, for recovering of the catalogue of books "belonging to the late Lord Elliock."

Against this interlocutor Henry Veitch represented on two grounds; 1*st*, That the books and furniture having been rendered heritable *destinatione*, and never having been vested in Lieutenant Veitch by service, could not be attached by any diligence at the instance of his creditors; 2*d*, That at any rate the arrestments of these subjects were inept, or ineffectual, for a variety of reasons. Young, &c. on the other hand, maintained, that possession of these subjects was equivalent to service, and that the arrestments were good.

On considering this representation, the Lord Ordinary found, "in "respect that no title by service or otherwise was made up by Lieuten-"ant Veitch to Lord Elliock's library, which, by his Lordship's settle-"ment, was rendered heritable *destinatione*, that the arrestments used "by the creditors of Lieutenant Veitch were ineffectual to attach the "same; and therefore recalled diligence granted in absence for recover-"ing catalogues of said library, and decerned accordingly."

On a reclaiming petition against this interlocutor, with answers, the Court, (5th March 1806,) adhered; but, on a second reclaiming petition for Young, &c. the interlocutor of Court was, (June 2. 1807,) "Alter the interlocutor of the Lord Ordinary reclaimed against; "sustain the arrestments used by the petitioners as sufficient to attach "the furniture, books, and effects conveyed by the assignation in the

"deed

" deed of entail executed by Lord Elliock; prefer the petitioners in vir-
" tue of their interests produced upon the fund *in medio*; and remit to
" the Lord Ordinary to proceed accordingly."

Against this interlocutor Henry Veitch presented a reclaiming petition, which was answered. The whole cause was gone over in these papers; but as no decision was given on any point but the first above mentioned, it seems sufficient to report the argument on this point.

Argument for Henry Veitch, petitioner.

It is not necessary to maintain that the entail of the subjects in dispute is effectual. It is sufficient to say, that Lord Elliock clearly intended to entail them on the series of heirs to whom his landed estate is destined; and that this entail must at least be effectual to the extent of rendering them heritable *destinatione*.

There is no rule better established in the law of Scotland than this, that heritage does not pass *ipso jure* from the dead to the living; but that such heritable rights as are not cloathed with infeftment must be taken up by general service, and such as are cloathed with infeftment by special service or precept of *clare* and infeftment thereon. Upon this rule the well known distinction of heir apparent and heir is founded; and the whole system of our law respecting heritable rights depends on it. Ersk. b. iii. tit. 8. § 54.—Stair, b. iii. tit. 5. § 25.

Lord Stair in this passage mentions all the exceptions to this rule that exist. But moveables made heritable *destinatione* is none of them. Nor is there any of them in which *possession* is equivalent to *service*. Wherever service is unnecessary to vest an heritable right, it is because that right vests *ipso jure*.

Heirship moveables are said to form an exception to this last observation. But, in the *first* place, there is no authority for this but a solitary old decision, Blackburn against Rigg, 2d Feb. 1610, Dict. vol. ii. p. 368. And this decision is contrasted by a later one, Auchinleck's heir, 22d Dec. 1630, Dict. v. ii. p. 368.

In the *second* place, supposing this were one exception, that would not be a sufficient reason for making another exception in a different case.

But, *thirdly*, the right to heirship moveables is not an heritable right in the proper sense of that term. It is not a right which descends from heir to heir like heritable succession. It is more truly analogous to legitim or *jus relictae*. It goes to the heir once for all like a legacy of moveables; and becomes instantly, in all respects, a part of his moveable property, going to his executor not his heir. The heir receiving heirship moveables may, to be sure, leave heirship moveables out of his own estate, as a child receiving legitim may leave legitim to his child, but there is no identity of the one heirship with the other. Nor is there any connection whatever between the receipt of heirship by any person and the transmission of heirship out of his estate. If he be a prelate, baron, or burgess, he will leave heirship whether he receive it or not; if he be not any of these, he will leave no heirship whether he received it or not.

Heirship

Heirship moveables, therefore, are not proper heritage descendible *de haerede in haeredem*; and do not form any exception to the rule that no property of this kind can vest by mere possession, which is as universal in our law as it is marked and decisive.

The law of apparency shews this very clearly, for it all rests on the assumption, that the apparent heir has the fullest possession, while yet the right of fee and property never is vested in him. The act 1696, ch. 24. recognizes this rule, in the most striking manner, by the cautious and limited relief which, in a certain case, it affords against the operation of the rule; and this act too has received a strict interpretation.

No analogy can be drawn from the transmission of proper moveables by possession, for the whole law of descent and transmission is altogether different in regard to heritable and moveable rights. And even as to proper moveables, the effect of possession in transmission from the dead to the living, seems to have been owing to special statute, 1690, ch. 29. Bankton, vol. ii. page 407.

The consequences of the doctrine maintained on the other side sufficiently shew that it is inadmissible; for they are absolutely irreconcilable with the established forms of transmitting heritable property.

Supposing the heritable right to these subjects to have been vested in Lieutenant Veitch by possession, then it could no longer be taken up by a service to Lord Elliock, along with the right to the landed estate; but must be taken by a separate service to his apparent heir—and the first, and only general service that ever was expede as heir to the institute in the personal deed which carried all these heritable rights, would not have the effect to transmit the whole, but only a part of them; a consequence very contrary to the ideas hitherto entertained of heritable rights and services, and tending directly to involve our law on this subject in confusion.

But, further, it is admitted that, on this supposition, a service to Lieutenant Veitch would in all cases be competent; and if possession could not otherwise be allowed, it would be necessary, in order to take up these subjects. But in this service, where would be the evidence that the fee of this heritable right was ever vested in him, without which the service could not proceed? Will it be said that parole proof of possession would be adduced in order to shew this? Such a thing never was heard of; and is absolutely inconsistent with the form of services and of the transmission of heritage, as invariably fixed in practice, by which there must be a series and connection of written titles; and no person can be served heir to a preceding heir, unless that preceding heir has had the right vested in him by the written title of a service, or by infeftment when infeftment is necessary.

Argument for Young, &c. respondents.

I. The clause conveying these subjects is not only not capable of constituting a proper entail of them, but it does not appear that it was intended to create such an entail, nor to create any heritable destination, in the sense in which that word is used by the petitioner. It merely assigns the moveables that *shall be* in the house of Elliock, at the time of Lord

Elliock's death, to his heirs; which seems to be nothing more than a bequest of these moveables, once for all, to the heir,—without any attempt at a perpetual destination. There is no reason to say, that the nomination of heirs is more than a conditional institution.

II. But at any rate there is no authority in our law for saying that a perpetual destination of moveables can be effectually made by any terms, or that they can, by the will of any person, be converted into proper heritage. None of our law writers lay down such a doctrine, which seems in itself very unreasonable. Moveables may be bequeathed under what conditions the testator pleases, but still they are moveables, and may be taken by the person to whom they are bequeathed as moveables are taken.

Now, it cannot be denied that moveables, in every form but that in question, pass from the dead to the living by possession.

That possession is equivalent to confirmation in transmitting the *ipsa corpora* of moveables, is clear from Erskine, b. iii. tit. 9. § 30.—Bankton, b. iii. tit. 8. § 119.—Dict. vol. iv. p. 269.—Nor did this rule arise from special provision of the Stat. 1690, ch. 29. but from views of common law and ancient practice. See Kilkerran, p. 509, case of M'Whirter. This statute had no tendency to supersede confirmation where it formerly was necessary for transmission, but merely to take away the burden of it where it was not necessary, but was insisted upon only by the commissaries for their fees. Possession has the same effect as to *jura crediti*, which pass to the executor or general disponee by payment or corroboration, the only sort of possession such rights admit of. Dict. vol. iv. 271, and vol. ii. page 369.

The property of heirship moveables passes in the same way, though this is destined, by law itself, to the heir, and is carried, if he chose it, by a service. Nay, it *must* be carried by a service, if the moveables are in the hands of third parties, who do not choose to deliver possession without it; and yet, if possession of heirship moveables is obtained, the property of them passes to the heir by that possession. This is the true import of the decision in the case from Auchenleck, 22d December 1630, which is erroneously reported in the Dictionary. In that case a clock, which was heirship, was ordained to be given up to the heir when served; but the reason was that it was in the hands of a third party, and had never been in the possession of the heir, or of the purchaser from him, who claimed it.

And this doctrine is supported not only by the case of Blackburn, quoted by the pursuer, but by the opinions of Erskine, b. iii. tit. 8. sect. 17 and 77; Bank. book iii. tit. 5. sect. 13; and Lord Kames, Elucidations, page 97.

It is said that the right to heirship moveables is not proper heritage; but it is at least as much so as the right to moveables made heritable *destinatione*. These rights equally go to the heir; they may equally be taken by service, and not by confirmation; Erskine, b. 3. tit. 8. sect. 63. The right to heirship cannot be conveyed away on deathbed; Erskine, sup. sect. 98. If the heir intermeddles with them, he incurs the passive title of *gestio pro haeredi*; Erskine, sup. sect. 68. Accordingly, the right to heirship is uniformly treated as heritable, Erskine, b. iii. tit. 8. Bank. b. iii. tit. 5. to heirships; in all these respects heirship differs totally

tally from the legitim or *jus relictæ*, which vest without either service or confirmation, or possession, and never were imagined to be in any respect heritable.

It is said heirship moveables do not descend to a line of heirs, at least, they do not necessarily do this; but neither do moveables, heritable *destinatione*, necessarily descend to a line of heirs. The first heir may, at his pleasure, deprive them of their heritable nature,—even a bond secluding executors, or destined to a series of heirs, may lose its heritable nature by payment or assignation: books and furniture are certainly not less liable to return altogether into the class of moveables.

Since then, in every other instance, moveables transmit by possession, even where they are heritable, there seems to be no reason whatever for denying the effect of transmitting them to possession, where they are destined to heirs.

As to the difficulties that are started, they only shew that it is impossible by destination to take moveables entirely out of their own class, and apply to them all the rules and forms relating to proper immoveable rights; and after all, these are difficulties of form only, from which no serious bad consequence could be feared.

But, on the other side, there are substantial mischiefs to be feared from refusing to allow possession to transmit moveables destined to heirs.

It will be observed, that there is no record of such destinations; and, therefore, it is impossible the public should have any suspicion, that a man, possessing moveables to which no body else pretends any claim, is not truly the proprietor of them. Purchasers and creditors must therefore be exposed to a new danger from which there is no defence; and to the very danger from which our law was anxious to protect them, by refusing to sustain transferences of moveables, *retentia possessione*. Rights to moveables would in that case come to be affected by all the neglects and errors, to say nothing of frauds, that might take place in following the intricacies of services.

The Court unanimously pronounced this interlocutor, (25th May 1808,) "Find that the property of the library and furniture of the late "Lord Elliock was effectually vested in the person of the late Lieuten- "ant Veitch; and in so far refuse the prayer of this petition, and ad- "here to their interlocutor reclaimed against; but, with respect to the "objections to the arrestments and all other points of the cause, remit "to the Lord Armadale, Ordinary, to hear parties thereon, and to do "therein as he shall see cause."

There was however some difference, as to the reasons on which different Judges concurred in this judgment.

Three of the Judges expressed their opinion, that the clause in the entail, relating to the moveables in question, was not so expressed as to constitute a proper heritable destination. That it was rather of the nature of a bequest to the heir, or a conditional institution; and that if it had been a proper heritable destination, they thought the argument for Mr Veitch very strong, and would have had great difficulty in acceding to the interlocutor. The President, and three other Judges expressed their opinions on the ground, that there *was* an heritable destination, but that still the subjects, being *sua natura* moveable, might be transmitted by possession.

The

The Lord President in particular observed, That service was properly a feudal form, and intended to satisfy the superior of the heir's right of succession, and procure investiture: That it had been extended to cases of heritable *jus crediti*, and was used to satisfy the debtor of the heir's right of succession, and consequently lay him under an obligation to pay or perform to that heir.

That, even in these cases, the feudal right, or the *jus crediti*, vested without service by precept of *clare constat* from the superior, or acknowledgement of the debt from the debtor, if they were willing to grant such precept or acknowledgement.

But that, in no case, was service necessary, or proper, where there was no superior and no debtor, where the right was real and allodial, on which the heir had only to take possession without the consent of any person. That possession of such property was full investiture in it. That besides heirship moveables, leases afforded an example of this; for these, when granted to heirs, passed without service by possession, because a lease was not a *jus crediti*, and there was no investiture of them required from the landlord. That moveables destined to heirs must pass in the same way, since, though thus destined, they were still allodial property; and if the heir took possession of them, there was nothing more left for him to do. He might use a service if he pleased, but he had no need of it. That it would be an odd incongruity if an heir succeeding to a lease, and to farm stock settled to go along with it, might take the lease without service, but required a service to the farm stock.

Lord Ordinary, *Armadale*. Act. *Mat. Ross*. Alt. *John Reid*.
A. Kincaid Tate and *Will. Keyden*, W. S. Agents. *S.* Clerk.

M.

No. XLV. *June* 1. 1808.

ARCHIBALD CONSTABLE and Co.

AGAINST

The Trustees of Professor JOHN ROBISON.

CONTRACT.—*An author agreed with a Bookseller for the publication of a work of Science, the price according to a certain rate per sheet, payable by instalments, as the work was published. After the publication of one volume, constituting in itself a complete part, the progress of the work was interrupted by the death of the Author. His representatives are entitled to the price of the finished portion, according to the stipulated rate.*

PROFESSOR JOHN ROBISON, having resolved to publish the substance of his Lectures on the Elements of Mechanical Philosophy, had certain communings with Mr Constable on the subject.

Mr

Mr Constable then addressed the following letter to Mr Robison. 7th November 1803. " I agree to purchase the copy-right of your work, " to be entitled the Elements of Mechanical Philosophy, at the rate of ten " guineas per printed sheet; and the whole work to consist of about 500 " pages in octavo; and as you propose publishing in four parts, you " will of course allow me the usual credit given to the trade in similar " transactions. Your answer in course of to morrow will much oblige " me. I am," &c. and on the 15th December a letter in these terms: " In addition to my note to you of the 7th current, I now beg leave to " propose to you, that if your work shall be published in parts, you shall " be entitled to payment at the rate of ten guineas per sheet, at nine " months after the publication of each part; or, if you prefer it, the whole " to be paid at six and nine months after the publication shall be finally " completed.'

In advancing with the composition of the work, the views of the author extended beyond his own original intention, or that of the booksellers; and he wrote the following letter. " 18th July 1804. I have " not been unmindful of my engagements with you; and have been " pushing on my syllabus as much as in my power. I have however " only been able to complete the article astronomy; and if I had my " choice altogether unembarrassed, I should write it all over again before " sending it to the press, because I think it too full. I fear that what I " have now to give you will run to 350 pages; this, with 264 already " printed, will make too large a volume. At the same time, I am not " altogether resolved what to do. Astronomy is the part of the whole " course, which it would be the greatest saving of time to my lecturing, " if my students had a full instruction in their hands. None of the " English elementary books that I know enable the students to understand the Newtonian Philosophy. This is my favourite object; and I " shall give no more than what is absoultely necessary for this purpose. " This however is not the bookseller's concern; and I am in some " measure to be swayed by your notions of the thing, otherwise I do " not attend to the terms of the agreement between us, in the sense in " which it was taken. You may, and I do fear, that the great bulk of " this part may hinder the sale of the whole. If this be your opinion, " I can easily curtail the volume by 150 pages of letter press, by o- " mitting the two last articles, the figure of the earth and the tides; " yet they are the most curious, as they are by far the most intricate " parts of the Newtonian Philosophy. I beg you will think of this; and " let me know your mind as soon as possible; for in four or five days, " I shall be ready to go on with Mr Willison, whom I expect to be " now at leisure, as the session papers are now asleep for a while. I " am sadly troubled about my figures; my eyes fail me very much; " and I cannot draw them so small, and so exact as I have done. This " will occupy more plates, but I cannot help it. Engravers cannot re- " duce mathematical figures like others, because they know not how " they are drawn. I wish you would call here; and I would show you " the figures. They will amount to about fifty besides those already " drawn. I am," &c.

The letter written in answer to this communication was not produced; but the Court assumed, and the pursuers did not deny, their unqualified acquiescence. The first volume was printed in November 1804; and after its publication, the pursuers inclosed bills for the sum of L. 515, at 6, 12, and 18 months, in the following letter: " 10th January 1805. We " have the pleasure to enclose you our promissory notes as under, for " the amount of the copy-money of the first volume of your Elements " of Mechanical Philosophy. We also placed L. 8. 16s. 6½ to the cre- " dit of your account, being the difference of interest on the additional " credit allowed us. We shall be happy to have frequent occasion to " make you similar payments; and we are," &c. The above is all that is material in the writings that passed on the subject.

On the 30th January 1805, Professor Robison died. One of the bills was paid; but the trustees found it necessary to charge the pursuers for payment of the rest. The charge was suspended by the pursuers, who at the same time brought an action for repetition of the sum already paid, under the qualification of accounting regularly for the expence, and the sale of the published volume.

The cause was discussed before the Lord Justice Clerk, Ordinary, who pronounced the following interlocutor, (17th January 1806:) " In re- " spect that the agreement between the parties contains a provision for " publishing the work in parts, and for paying for the same, either at " the time of publication of each part, or after the publication of the whole, " at the option of the author; and that the volume published is admitted " to contain a complete part, treating of one separate branch of science, form- " ing an intelligible and useful work by itself; and further, in respect that the " suspenders did publish and sell to the public this said volume or part, with- " out any condition to take back what they now plead is of little or no value " without the rest of the work; and the suspenders, by paying one of " the bills, which did not fall due till after the author's death, appear to " have themselves understood this to be the genuine interpretation of " the agreement; repels the reasons of suspension; finds the letters order- " ly proceeded, and decerns; finds expences due; and allows an account " thereof to be given in, and submitted to the auditor."

The cause came by petition and answers before the Inner House.

Argument of the pursuers.

To ascertain the nature of the contract between these parties, and the obligations thence arising, it is necessary to attend to what was its object. From the letters between them, it is clear that the subject which Professor Robison proposed to sell, and the pursuers agreed to purchase, was an entire work, to contain, and be entitled the 'Elements of Mechanical Philoso- " phy." The contract related to a system, or whole, involving the various branches and parts of a science; and the value of the work consisted in the union and completion of all the parts, in a systematic form.

As, therefore, in contracting for such a work, the pursuers could not expect reimbursement till after the period of its completion, the amount of the price must have been determined on the confidence, and under the implied condition, that a complete work was ultimately to be delivered.

livered. Of all commodities, a literary work containing a system of science, is that of which the value depends the most upon its completion. Its permanent value is derived from its systematic form; and several editions are required to reimburse the expence of publication. The mode and times of payment, whether wholly at the commencement, or after the termination of the work, or partially, according to its progress, are contingent circumstances arising from the liberality of the parties, or their confidence in each other; and cannot affect the fundamental principles and stipulations by which the amount of the price was ascertained. The mode of partial payment, therefore, could not alter the substance of the contract, the nature of the subject purchased, or the terms on which alone the payments could be understood to be warranted.

Neither can it affect the principles by which this case must be decided, that the science, of which this work was to treat, consisted of various distinct branches, nor that the published volume contains a complete part. If a fragment only had been contained in it, the same decision must have been pronounced for which the defenders contend in this instance; because a court of law cannot place its judgments on so fluctuating a foundation as the accidental divisions of any science of which the nomenclature and arrangement are daily changing by the progress of discovery.

To illustrate by another instance. Several of the pictures of Sir Joshua Reynolds occupied that artist many years to finish. If, however, he had received part of the price, and died before their completion, the individual works would have been without value. In such a case, it is impossible to maintain that the purchaser could have been bound to receive the unfinished picture, or the representatives of the artist entitled to retention of the partial payments.

In like manner a sailor has no claim for wages if he does not finish the voyage; neither have his executors if he dies before it be completed.

In the terms of contract, the contingency of the author's life has not been provided for; and this risk must fall where the presumptions of the case direct.

That the risk should be imposed on the pursuers cannot be maintained on the general principles of the law of contract, because a purchaser stipulating for the delivery of a commodity, or the performance of a fact, is not presumed to incur any risk which may impede the one or prevent the other, unless it be specifically so stipulated.

In the general case, an author brings a complete work to the booksellers for sale; and if he had died before its completion, the loss must have been his own. There is nothing in the terms of the contract in the present instance to remove it out of the general case; and this partial and progressive payment of the price cannot alter the essentials of the contract.

In a word, the pursuer has not received that for which he stipulated; and must be entitled to repetition of the sums paid on the faith of a contract of which it is now impossible to obtain fulfilment. Besides, a decision in favour of the defender would be injurious to the interests of literature. The most valuable monuments of genius, those by which the power of mankind has been extended, and their minds enlightened, have been

been the laborious and gradual production of many years, and their publication has in many cases been retarded by the pressure of poverty. This inconvenience has been removed by the practice of modern booksellers, the best patrons of genius, who have been accustomed to advance the price according to the progress of the work. But this liberality will be fatally and necessarily checked, if in cases like the present, when the price has been progressively advanced, the booksellers shall be held bound to pay for an unfinished work.

Argument for the defender.

The nature of the contract must be discovered from the correspondence joined to the circumstances and presumption of the case. That the pursuer had contracted to receive, and Professor Robison to deliver a complete work, embracing a system of science; and that, except in the event of its completion, the stipulated price was not to be paid, is a view of the case which the correspondence of the parties does not warrant, and which in the absence of distinct and specific stipulation, is not to be presumed.

The author approached the age of seventy; and was debilitated by long continued disease. The work was of great research and magnitude, and consisted of many volumes, of which the materials had neither been prepared nor arranged. These facts were known to the pursuers; and they confessedly did not deal for an article ready for delivery.

It is impossible to presume, that a philosopher, whose name was unrivalled in his country, would have exclusively devoted his time to the production of a work which in all probability would occupy the remaining years of his life; and for which, except in the event of its completion, he was not to receive a recompense.

The circumstances of the parties, and the views to which these circumstances led, must dictate the bargain between them, so far as is unprovided for by themselves. The author was to receive a fair reward for his labour; and the booksellers trusted that he would live to finish what he had begun. The former might, unfettered by contract, have published a complete system, by bringing out distinct branches or parts, each constituting a valuable and independent whole, yet each having a systematic relation to the other. The latter, by withdrawing the author from other employment, secured to themselves a fair chance of a work from which they would have derived permanent profit. The stipulation that the work should be published in parts, establishes that the pursuer was desirous to combine the present profit of selling a treatise on distinct and independent branches, or parts of the science, with the ultimate profit arising from the sale of the complete system.

The bargain clearly was, that the work should be published in parts, and that each part should be paid for when published. The obligation of Mr Robison has been so far fulfilled, and that of the pursuer to the same extent incurred. The defenders do not insist that for an unfinished work, the pursuer shall pay the price of a complete work, but that they shall fulfil an obligation of which to them the counter part has been already performed.

If

If the published volume had produced to the pursuers profits exceeding, instead of falling below expectation, it would not have been competent for the trustees of Mr Robison to have insisted for repetition of these profits on payment of the expence of publication. Are the pursuers then to be free while the defenders are bound? Or are the pursuers bound only by a lucrative contract?

The cases put in illustration are inapplicable. The unfinished work of a painter is not a "complete part, treating of one separate branch of "science, forming an intelligible and useful work by itself."

The interests of literature cannot suffer by a decision which is consonant to justice, and bestows on labour and talents their fair reward. On the contrary, no man of genius would ever withdraw his attention from other objects, and devote it exclusively to the production of a long work, if, in the event of his death, that part of his recompence which accorded with the progressive completion of the work, and on which himself and family had subsisted, is to be wrung from his representatives.

The Court coincided in the grounds of decision of which a summary is contained in the interlocutor of the Lord Ordinary; and observed, that at the first communing about the projected publication, a smaller work was in contemplation of the parties. The transaction then changed its nature, and a work was undertaken of greater extent, research, and importance; and of which a longer period was required for the completion. By occupying the time, and by giving a direction to the labour of the author, and by withdrawing him from other pursuits, the pursuers must be understood to have undertaken the risk of his death. No doubt both parties, in entering into the contract, had in their contemplation the completion of the work, but this part of the contract is modified by the stipulation that it was to be published in parts; and that each part was to be paid for when finished. If the profits of the volume that was published had exceeded the expence of the printing, and the stipulated price of the copy right, the defenders, on the death of Professor Robison, would not have been entitled to compel the pursuers to account for those profits, and to return the price that had been paid to them. The argument of the pursuers, therefore, would lead to the inadmissable conclusion, that one of the parties was bound and the other free.

One Judge was of a different opinion. The pursuers, he observed, had stipulated for a whole work, and not for one volume, or one sheet of a book, or one section, or branch of a system. The object of the partial payment was the accommodation of the author, and not any qualification of the original obligation. The copy right of a complete and entire work, and not of a part of it, was the object of the contract. To entitle a party to pursue implement of a contract, he himself must be in a condition to fulfil, and to offer to his adversary the alternative of performance, or entire restitution. But it is plain that the defenders are not in that situation. In the case supposed, therefore, the defenders, on obvious principles, were not entitled to return the price and receive the profits of the publication, and no argument can be drawn from this view of the corresponding obligation.

The following interlocutor was pronounced, (1st June 1808): "The "Lords having resumed consideration of this petition, and advised the

" same, with the answers thereto; adhere to the interlocutor complained " of, and refuse the desire of the petition."

Lord Ordinary, *Justice Clerk.* Act. *Ja. Moncrieff.* Alt. *Advocatum.*
Jas. Gibson, W. S. and *Hay Donaldson*, W. S. Agents. *M.* Clerk.

J. W.

No. XLVI. *June* 2. 1808.

ROBERT EWING acting partner of the Lanark Twist Company,

AGAINST

ADAM WRIGHT.

LETTER OF CREDIT.—*A person who gives credit on an unlimited letter of credit, without notification to the granter of the letter, does not lose his right of recourse on the granter from the want of notification.*

ADAM WRIGHT, in order to enable Joseph Simpson and Company to procure yarns to the extent of about L. 50 within a year, as was alleged, delivered to Joseph Simpson the following letter, signed by himself: " As Messrs Joseph Simpson and Company may have occasion " to purchase yarns from you from time to time, I hereby guarantee the " regular payments, at the ordinary periods of credit, of whatever pur- " chases they may make from you within twelve months from this " date." This letter was neither dated nor addressed; but Simpson filled up the date with " Glasgow, 10th June 1806," addressed it " to " the Lanark Twist Company," lodged it with that Company, and upon it took yarns from them on credit between the 3d July and 3d of December 1807, to the amount of L.591. 10s. 9d. Though the parties all lived in Glasgow, no notice of this was given to Wright, either by Simpson and Company, or the Lanark Twist Company, till the 31st of January, when Simpson and Company had become bankrupt. The Lanark Twist Company then demanded payment of the above sum from Wright; and on his refusal brought an action against him for payment of it. In this action, the Lord Ordinary pronounced this interlocutor: " Repels the defences pleaded for the defender Adam Wright, " and decerns in the principal cause, in terms of the conclusions of the " libel against him."

The defender reclaimed.

Argument for defender.—The defender cannot be bound for the price of these goods furnished to Simpson and Company, because he never received any notification that these furnishings were to be made. This notification

notification the pursuers were bound to give, because the letter of credit was unlimited as to the extent of credit to be given; and in such cases, the person given credit is bound to notify to the granter of the letter. This was decided, Burnet, 7th January 1681, Stair's Decisions. The opinion of the Court to the same effect, is to be found in the report of the case of Lennox, 6th December 1773, Kilkerran, p. 336; and the same thing appears, as to the letters of credit in general, in the case Mansfield *contra* Weir, 9th 1749;—same title Kilkerran.

The very nature of a letter of credit, not bearing any express limitation, must warn the person giving credit that some limitation must be understood; and to avoid exceeding that, he is bound to give notification to the granter. It cannot be supposed that he may go all lengths—that he may give credit for L. 1000,000 for instance; and if not, it is plain he cannot safely go any considerable length without notification. In this case, by not giving notification, the pursuer enabled Simpson to go far beyond the intention and true meaning of the letter of credit, and this is what he ought to have foreseen might naturally happen from dealing in so negligent a manner, so that he cannot complain if he must himself take the consequence.

The Court refused the petition (9th February 1808,) without answers.

The defender presented a second reclaiming petition, which was also refused without answers.

Some of the Judges thought that notification never was necessary in any case where credit was given upon a letter of credit. That to require it was contrary to the nature and use of such letters, and that the imprudence of men, in granting them without limitation, must be left to be cured by its natural consequences. Others observed, that it was unnecessary to lay down any such general rule; that cases might be figured where it would not apply; but that here the commission was limited in point of time, and the furnishings not exorbitant, in which circumstances notification was not necessary.

Lord Ordinary, *Newton*. Act. *J. Wolfe Murray*. Alt. *John Greenshields*.
Tho. Baillie, Agent. S. Clerk.

M.

No.

No. XLVII. *June* 2. 1808.

JAMES DUNDAS trustee on the sequestrated estate of RICHMOND and FREEBAIRN,

AGAINST

JAMES SMITH.

BANKRUPT—BILL OF EXCHANGE.—*An indorsation of a bill in payment, in the ordinary course of trade, is not liable to reduction on the statute* 1696, *though it be within sixty days of the indorser's bankruptcy.*

RICHMOND and Freebairn were insurance-brokers in Edinburgh. James Smith was an underwriter in their office for behoof of himself, his father, and others. He had underwritten there during the year 1800, and they had received the premiums up to the end of that year. He had also underwritten there during the year 1801, though it did not appear that they ever received any of the premiums of that year, (see Bertram against Trustee for Richmond, &c. 26th November 1802, Fac. Coll.)

On the 4th of August 1801, Richmond and Freebairn indorsed to James Smith two bills for L. 200 each, drawn upon and accepted by James Beveridge of London, due one on the 12th—15th October, the other 16th—19th October. Smith remitted the bills to his father at York on account of the premiums due to him. At that date, there had been no balance of accounts struck between Smith and Richmond and Freebairn for the transactions of the year 1800; but Smith was creditor in account for more than the sums contained in these bills. There did not appear to have existed at that time any apprehension of Richmond and Freebairn becoming bankrupt. They were, however, made bankrupt in terms of the act 1696, on the 6th of September 1801; their estate was sequestrated; and James Dundas was appointed trustee upon it.

The trustee brought an action against James Smith, for reducing, under the act 1696, the indorsations of the two bills above mentioned. The interlocutor of the Lord Ordinary, (May 24th 1805,) was,—"Finds, "that in practice there is a current account, debit and credit, between "the broker and underwriter who do business at his office, fluctuating from time to time, so long as the parties continue in credit, and "till the actual failure of the one or the other; so that it would be unjust to allow the creditors of either to avail themselves of one side of "the account, without taking the other side of it into view. That the "bills passing between them cannot be considered in the light of securities for anterior debts, so as to fall under the act 1696, and that "such bills, especially when remitted to persons at a distance, are properly payments in cash. Finds, in terms of the report, that there was "no mutual settlement of accounts betwixt the parties, striking an acknowledged balance previous to, or at the period of the indorsations in "question, and that such transactions as took place between them went

"on

" on posterior to the indorsations in question, in the same manner as " previous thereto. Finds, that upon the 6th day of August, Richmond " and Freebairn indorsed to the defender bills for L. 400, accepted by " James Beveridge, which bills the defender indorsed to his father " Thomas Smith, and other correspondents at York, for whom he was " in use to underwrite at Richmond and Freebairn's office here. Finds, " that although there may be no valid distinction, in a general view of " the act 1696, between foreign and inland bills, so as that the one " should be exempted from the sanction of that statute, and the other " liable to it; yet if, in the ordinary course of business, an under- " writer in this country, unconscious of failure in the circumstances of " the broker whom he employs, not only for himself, but for his cor- " respondents in England, accepts of an indorsation of bills of exchange " from that broker, and remits them to such correspondent, while the " credit of the broker is unimpeached, the transaction cannot be set aside " upon the act 1696, unless it shall appear that such remittance was in " payment of a debt already liquidated. Finds no evidence that the " debt due to the debtor's English correspondents, who received the re- " mittance of the L. 400 under challenge, had been liquidated at the " time of the remittance; the alleged delay of which, as well as the cir- " cumstance that the bills are said to have been indorsed indefinitely to " account of the balance which might ultimately be due to the defender, " affords real evidence, as well of the *bona fides*, as of the application of " the general doctrine assumed, in the first part of this interlocutor, to the " circumstances of the case; assoilzies from the reduction in regard to this " article."

The cause came before the Inner-House by petition and answers.

Argument for the pursuer.

These indorsations were, in terms of the act 1696, " dispositions, as- " signations, or other deeds, made by the bankrupt, in the space of sixty " days before his becoming bankrupt, in favour of his creditor, either " for his satisfaction or further security."

For it is clear law, that they are not taken out of the statute merely by being indorsations of bills, *Fountainhall*, 2d February 1700; Durward against Wilson, 16th January 1713;—Campbell against Graham, *Dalrymple* *;—Manson against Angus, 19th February 1772, not reported, but in which this point was determined on full discussion, and the judgment of this Court was affirmed in the House of Lords, 22d March 1774; M'Hutcheon against Welsh, 29th January 1794 †.

2dly, There is no authority whatever for saying, that indorsations of foreign bills are in a different situation from indorsations of inland bills. The observation of the collector in the case of M'Gibbon against Campbell, (10th August 1780) is now admitted, on all hands, to have been erroneous; and it was decided that there was no such difference in the case of M'Hutcheon against Welsh.

3dly, It cannot take the indorsations out of the act that they were in *payment*; for the statute expressly includes deeds made " for satisfaction."

* Same in Forbes, p. 646.

† Not reported; but see Bell's Bankruptcy, vol. i. page 171.

4thly, It cannot have this effect, that the indorsations were given *bona fide*, without contemplation of bankruptcy; for the very object of the statute, in fixing the retrospective term of 60 days, was to supersede all enquiry into that circumstance, by adopting a general presumption from a circumstance that was always certain;—accordingly, this plea has uniformly been disregarded in actions on this statute.

5thly, These indorsations are not taken out of the statute merely by the circumstance that they were made during the existence of an open account. The Court may just as well rescind the statute *in toto*, as deny effect to it in all cases, where the parties happen to have an open account. There is not the smallest authority for such an exception. Indeed, it would destroy the effect of the statute altogether; for not only are open accounts very common, but it is quite easy to keep an account open for the very purpose of eluding this statute. The case of Sir William Forbes and Company (1st March 1791), did not establish any such rule. In that case, the indorsation was sustained because a subsequent advance to a greater amount had been made by the indorsee. The case of the Pelican Insurance office, 26th June 1805, was circumstantiate; but at the utmost only established, that indorsations within the 60 days must compensate advances by the indorsee within the 60 days.

The mere existence of an open account on which no advances at all have been made subsequent to indorsations, or even within the 60 days, has never been found to take those indorsations out of the act 1696.

These are all the circumstances that can be imagined to take this case out of the statute.

Argument for defender.

It is not necessary for the defender to dispute simply and precisely any of the pursuers propositions. He maintains, that the indorsations do not fall under the act 1696:

1*st*, Because they were payments made *bona fide in the ordinary course of business*.

The deeds, &c. which the act declares reducible, are "granted in "favour of creditors, and in preference to other creditors;" but payments, made in the ordinary course of business, are neither of these; so that they do not come under the words of the act. Still less do they come under the spirit of it. For it never was intended to rescind all the ordinary dealings of every person who became bankrupt for 60 days back. Such a provision would have done far more harm than good;—accordingly, payments in money have always been held not to fall under the statute, because these were presumed to be of this description, Bean against Aberdeen, 1st August 1760, Ersk. b. iv. tit. 1. § 41. But now that the use of cash is almost entirely superseded, payments in the ordinary course of trade are generally made by indorsation of bills. In this form, however, they are still payments in the ordinary course of trade, and as such must be exempted from the reduction on the act 1696.

2dly, This is still clearer where a current account of debit and credit subsists between the parties, as in this case. For there it is obvious,

obvious that the payment is not only not given in contemplation of bankruptcy, but it is not given merely either for satisfaction or security of a prior debt. It is given with a view to future transactions as much as past; and can never be said to be given to one creditor in preference to others, since not only there can be no view to a preference, but it is quite uncertain whether the person, to whom it is given, may ultimately be a creditor or not, even independently of such payment.

This view was adopted by the Court in the case of Sir William Forbes, and still more clearly in that of the Pelican Company*.

The idea that deeds of any kind within the 60 days would be sustained, merely because they were in satisfaction or security of debts contracted within the 60 days, is supported by no authority; and there is no reason to suppose it was the principle of decision in either of these cases.

The majority of the Court adopted the first argument of the defender; and founded their opinion upon this, that, in the circumstances of this case, the indorsations of the bills must be viewed as payments in the ordinary course of trade; and, therefore, did not fall under the act 1696.

It was observed by several Judges, that indorsation of bills were certainly not exempted in general from the operation of the act 1696; and one Judge (Lord Armadale) expressed a decided opinion, that the mere circumstance of a current account existing between the parties was by itself of no relevancy in defence against a reduction on the act. That if in fact the bankrupt was debtor to the indorsee at the commencement of the 60 days, it signified very little whether the account had been balanced or not previously to that period; and that none of the cases quoted went upon this circumstance alone, but on advances being made by the indorsee subsequent to the indorsations, or at least within the 60 days.

The interlocutor of the Court (2d June 1808,) was, "Adhere to the "interlocutor of the Lord Ordinary."

Lord Ordinary, *Hermand.* Act. *Dav. Cathcart.* Alt. *John Connell.*
Tho. Scotland, W. S. and *Dav. Murray*, W. S. Agents. *P.* Clerk.

M.

No.

* See also Thomson's Trustee, 28th February 1806.

No. XLVIII. *June* 3. 1808.

WILLIAM IRVING,

AGAINST

CRAWFORD TAIT, Esq. W. S. and Others.

DEATH-BED.—*A disposition having been executed on death-bed, and the heir having died in minority, reduction at the instance of the next heir was sustained.*

ON the 11th June 1801, Andrew Irvine executed a trust-disposition, or settlement, conveying his whole property to William Irvine, his brother, Crawford Tait writer to the signet, and certain other trustees, whom he likewise named tutors and curators to his son. The objects of trust were, after payment of his debts, 1*st*, "For the maintainance and education of David Irvine, my only son, until he shall "arrive at the age of 21 years complete; whom failing, before the age "of 21, and having lawful issue of his own body, for payment to, or "division among them, such lawful children as he shall so leave, equally among them, share and share alike. 2*dly*, I hereby appoint my "said trustees, so soon as my said son shall attain the age of 21 years, "to denude themselves of this trust, and to convey my whole heritable "and moveable subjects in favour of my said son, and pay over what balance shall remain in their hands, upon a legal and sufficient discharge "of their haill intromissions and management. But in case my said "son shall die before attaining the age of 21 years complete, without "leaving lawful issue of his own body, then, and in that case, I hereby appoint my trustees to convert my whole heritable and moveable "estate into money, and to make payment of the following legacies to "the persons under-written, to whom I leave and bequeath the same, "and that as soon as possible after the death of my said son as aforesaid," viz. A variety of legacies are then enumerated, of which several were granted to the trustees and their families.

At the time of executing this deed, Andrew Irvine was in bad health; and he died on the 25th June 1801, fourteen days after it was subscribed, without having been either at kirk or market.

Messrs Irvine and Tait, and the other trustees, accepted of the trust; and proceeded in the arrangement of the affairs, by selling certain subjects, and by finishing buildings which had been begun by the truster. William Irvine was active in the management; and received a pecuniary remuneration for his trouble.

William Irvine, the trustee, died on the 27th August 1804; and David Irvine, the son of Andrew, having entered into the navy, died in the month of August 1805, in minority.

William Irvine, the eldest son of the deceased William, who now became heir at law of Andrew, then raised a process of reduction, on the

head

head of death-bed, for setting aside the trust-deed executed by his uncle Andrew, and under which his father had acted. The trustees raised a process of multiplepoinding and exoneration; and these conjoined actions having been advised by Lord Meadowbank, Ordinary, the following interlocutor was pronounced, (May 12. 1807.) "Finds, that the "possession of David Irvine, under his father's settlement, being that of "a pupil or minor, did not bar the challenge, of the person who might "be heir at law to him at his death, of that settlement: Finds that the "actings of William Irvine as a trustee under that settlement, while the "succession had not opened to himself, do not bar the same challenge, "and that even though the person who brings it happened to represent "him, (which, however, is not alleged in the present case to be the "fact,) therefore repels the defences; and in the reduction, reduces, "decerns, and declares in terms of the libel."

The cause came before the Inner-house by petition and answers.

Argument for the trustees.

1*st*, The deed having been accepted by David, the immediate heir, and his tutors and curators, all challenge at the instance of a remoter heir is precluded.

The origin of this branch of law is lost in obscurity; but from the earliest accounts it conferred on the heir, *alioqui successurus*, a right to reduce any deeds affecting heritage executed by his predecessor on death-bed, and to his prejudice. This right, however, might be renounced, either by consenting to the deed at the time of its execution, or by ratification after the granter's death.

At one time it was even doubted whether, where the immediate heir had died without either approbating or reprobating the deed, challenge was competent to the remoter heir. But such right was at last acknowledged, 21st January 1668, Schaw,—16th July 1672, Gray,—*Stair.*

It was then agitated whether the ground of challenge, competent to the remoter heir, arose from the injury done to himself, or whether he must plead in right of the immediate heir, against whom it was necessary to shew that lesion had been committed; and the Court at one time sanctioned the principle that "the exception of death-bed was competent to "remoter heirs, though the deed was not in prejudice of the immediate "heir apparent." Kennedy against Arbuthnot, *Kaim's Rem. Dec.* 13th July 1722.

But by a series of decisions, the Court have departed from this principle, and required that lesion to the immediate heir shall be established to found a reduction at the instance of a remoter heir, 13th February 1739, Craigs, November 1738, Irving. *Kilk. voce* Death-bed.

In the present instance, David the immediate heir, so far from being injured, derived material benefit from the deed challenged. It left him the entire disposal of the property, as soon as the law authorised him to exercise such power,—it saved him from the expence of a judicial nomination of tutors and curators; and enabled the trustees to take those measures for the beneficial arrangement of his property, which could not otherwise have been without considerable expence.

The deed being thus beneficial to the pupil, the trustees were entitled in his name to homologate, and act under it. Such ratification being a beneficial act of administration, is as binding in law as if it had been done by a person of full age. Such a proceeding does not amount to a settlement or alienation of heritage, to which a minor is incompetent, but is a useful act of administration which must validly infer its legal consequences. The trustees were bound to adopt the alternative of repudiation or ratification, and at the same time to consult most effectually the interest of the pupil.

It is impossible, therefore, to establish that lesion has been committed against the pupil, the immediate heir, by the deed challenged; and the ratification of the deed, and possession under it, now precludes challenge. For it has been determined, by the most recent decisions on the subject, "That the institutes in the disposition quarrelled, who were nearest heirs "at the time, having attained possession, the same is not reducible at the "instance of a remoter heir," 18th November 1740, Hedderwick, *Clk. Home.*

2d, William the trustee, the father of the pursuer, and the uncle of the minor, homologated the trust deed. This William, next to the minor, was *alioqui successurus*; and his acceptance, joined to that of the minor, must remove all ground of challenge. If William, the uncle, had survived the minor, challenge would have been incompetent to him, for he could not have approbated the deed, so far as the nephew was concerned, and reprobated it so far as it contained the substitution. The one provision was as illegal as the other; and both must have fallen or none. To have sustained reduction at his instance would have been to reduce all those dispositions and sales of the heritable property which himself had authorised and subscribed. It is no answer to say, that he had no interest, in respect the succession had not opened to him. His situation is the same as that of a remoter heir of entail, who may challenge contravention; and there exists for this right the same necessity. To wait till the succession devolved, would be to allow the period to elapse during which alone the necessary facts could be proved; viz. that the granter, at the date of the deed, laboured under the disease of which he died, and did not walk unsupported to kirk and market.

Argument for pursuers.

That the minor could not himself homologate the settlement challenged, is indisputable, because "a pupil has no person in the legal sense "of the word; he is incapable of acting or even of consenting." Erskine, lib. i. tit. 7. § 14.

Farther, the possession of the trustees cannot, in law, be held to be that of the minor, because they had a distinct personal interest to support the deed, in as much as, considerable legacies were eventually to arise to them under it. Besides they did not take those measures, by making up tutorial and curatorial inventaries, to invest themselves with the character of tutors and curators, which alone could identify them with their pupil, and render their actings his. They acted merely as trustees, in

in which character they had an interest distinct from that of their pupil. But it was *ultra vires* of the trustees to homologate the settlement, for such a proceeding amounts to alienation of heritage. Accordingly, if an heir ratify a death-bed deed, his creditors are entitled to set it aside under the act 1621, on the principle, that ratification is equivalent to a conveyance. Bank. lib. 3. tit. 4. § 44.

Such being in law the nature and amount of ratification, it was incompetent to the trustees, because they cannot authorise the alienation of a minor's heritage. Erskine, lib. 1. tit. 7. § 33. 8th March 1797, Cunninghame.

Even the possession of a wife along with her husband, does not infer homologation or consent on her part in such a case; 16th July 1672, Gray,—*Stair*.

So likewise in the case of a minor or infant. Dict. vol. I. p. 219. Bank. lib. 3. tit. 4. § 45.

In contemplation of law, the minor suffered lesion by the deed challenged; 1*st*, From the susbtitution of stranger heirs, in case he died in minority and without issue; and, 2*d*, From the distribution of the property among his children, in case of his dying in minority and leaving issue. In one event, his lawful heirs were altogether excluded; and, in the other, their interest was injured by a division of the estate different from that which the law would have declared. Accordingly, such lesion has been recognized in law. Dict. vol. i. p. 212.

Sir George Mackenzie (Treatise on Tailzies) likewise doubts whether a minor can, with consent of his curators, make a tailzie, "in respect that "a minor may be justly said to be lesed, in that he wrongs his family "and nearest relations."

That lesion against the immediate heir is not required to entitle the remoter to reduce, and that the latter pursues on the injury done to himself, may be considered to be determined. Erskine, b. 3. tit. 8. § 99. Bank. b. 4. tit. 4. § 34.

And there are several decisions in support of this opinion. Dict. vol. i. p. 212. Rem. Dec. No. 33.

In the last place, nothing has been done by William Irvine to preclude the pursuer. He acted as trustee under the settlement, and not *privato nomine*; and, therefore, that which is essential to homologation is wanting, viz. intention and consent.

But into his intention it is unnecessary to enquire, because, till the death of the immediate heir, any challenge at his instance was incompetent; and there is not to be found an instance in which such a challenge has either been made or sustained. Till the death of the immediate heir, he has no interest; he has only a precarious and defeasible right, a *spes successionis*, on which he was not entitled to pursue. An heir of entail is in a different situation; and has a *jus crediti* in the estate, which entitles him to challenge every act which interferes with his right. The pursuer, however, does not in any shape represent William the trustee.

The Court agreed in opinion with the Lord Ordinary. It was observed, that homologation cannot be inferred against a minor, even where

where acting with consent of his tutors and curators; and in the present case, the introduction of strangers into the succession was lesion, of which the heir was entitled to complain; neither did the acceptance of the trust, and the proceedings under it by William the trustee, preclude him. Homologation implies a right to challenge; and till the death of the immediate heir, the remoter was not entitled to pursue.

The Court adhered to the interlocutor of the Lord Ordinary; and upon advising another petition and answers, adhered, (3d June 1808.)

Lord Ordinary, *Meadowbank*. Act. *Tho. W. Baird*. Alt. *Alex. Irvine*.
Ja. Greig, W. S. and *Will. Callender*, Agents. S. Clerk.

J. W.

No. XLIX. *June* 7. 1808.

WILLIAM BALLENY Trustee on the Estate of GEORGE ROBB,

AGAINST

HENRY RAEBURN and Company.

RETENTION.—*Creditors who had received from their debtor a vendition* ex facie *absolute, but had at the sametime granted a separate missive, obliging themselves to reconvey on payment of a certain debt, were found entitled to retain the right in security of* another *debt afterwards contracted.*

RAEBURN and Company advanced to Robb L. 1300, by accepting two bills on London: In security for repayment of this sum, Robb gave them a vendition of the ship Turton which belonged to him. The vendition was *ex facie* absolute; but Raeburn and Company granted the following missive to Robb, (18th March 1806.) "We have this day, "at your desire, accepted two bills of this date, payable in London, at "four and six months, *pro* L. 650 each, drawn by you on us, and in- "tended to be applied in payment of part of the price of the ship Levi- "athan, purchased by you at London; and you having of this date con- "veyed to us two third-parts of your ship Turton, in consideration of "the obligation so come under by us on your account, we hereby "oblige ourselves, on the foresaid two bills being duly retired by you "when due, and produced to us discharged, to reconvey the said two "third-parts of the said ship Turton to you, your heirs, or assignees; "the expence of the conveyances to be equally divided betwixt you and "us."

Robb

Robb retired both the bills; but in the meantime he had contracted other debts to Raeburn and Company to a much greater amount. He became bankrupt; and Balleny, the trustee upon his estate, brought an action in the Court of Admiralty against Raeburn and Company, for reconveyance of the two-thirds of the ship Turton. They pleaded a right to retain this property for their whole credit against Robb. The Judge Admiral found, (17th April 1807:) "That as the defenders are "not possessors only, but fully vested in the property of the two-thirds "of the ship Turton, they are entitled to refuse reconveying the said "right of property to the pursuer, till the debts due to them by George "Robb shall be paid."

The pursuer presented a bill of advocation; and the Lord Ordinary on the bills reported the case on memorials.

Argument for the pursuer.

It is a general rule of law, that there can be no constitution of hypothec or pledge, without express consent of the debtor. Mere possession of a subject bya creditor is not sufficient to constitute this right. But consent to impignorate for one debt, is no consent to impignorate for any other debt. A pledge, therefore, is liable only to that debt for which it is pledged, not for all debt due by the pledger to the pledgee.

Even in the few exceptions to the general rule that are admitted by our law, there is no general hypothec, but a hypothec only for a certain debt or kind of debt, as in the case of a writer's hypothec on papers. Orme against Barclay, 18th November 1778, in that of a manufacturer's hypothec on goods; Harper against Faulds, 27th January 1791.

In this case, though the vendition being accompanied, *simul et semel*, with an obligation to reconvey on payment of a particular debt, was no more than an impignoration. In a question between the parties themselves, it can make no difference, that the different parts of this contract were contained in separate writings, still it was one contract of impignoration.

As the debt for which the hypothec was constituted has been extinguished, the hypothec must therefore be extinguished also; and the defender has nothing but bare possession, which gives him no right to retain.

Argument for defenders.

A disposition, *ex facie* absolute, gives a good security for future advances for the disponee to the disponer; Riddle against Creditors of Niblie, 16th February 1782.

But here there is a vendition, which is a disposition of a ship *ex facie* absolute. In the cases of pledge or hypothec quoted by the pursuer, the creditor had only the possession, not the property of the subject, but here he has the property; and it must remain in him till he executes a conveyance.

But this he is not bound to do while the debts due to him are unpaid. The case of Dougal against Gordon, 17th November 1795, is exactly similar to the present, only substituting assignation of a bond for vendition of a ship.

It was also pleaded for the defenders, that they had given credit to Robb on a full mutual understanding, that they were to be secured by the vendition; and they further pleaded, that L. 300 of the debt due to them by him was in truth a part of the original debt, as it had been advanced in order to retire one of the bills for L. 650. Both these assertions were denied; and the Court, in giving their opinions, did not think it necessary to take them into consideration. Upon the reasons contained in the first part of the defenders argument, with the exception of one Judge, their Lordships, (7th June 1808,) "refused the bill."

Lord Ordinary, *Newton.* Act. *David Cathcart.* Alt. *Daniel Vere.*
H. Fotheringham and *Jo. Ross*, Agents. *B.* Clerk.

M.

No. L. *June* 7. 1808.

JAMES BALFOUR

AGAINST

JOHN STEIN and OTHERS.

ARRESTMENT—*An admiralty arrestment of a vessel on the stocks is good.*

JAMES BALFOUR, a creditor of John Ferguson, on the 12th March, attached by an admiralty arrestment a vessel which it appeared belonged to Ferguson. The vessel was upon the stocks unfinished, and of course without masts. The arrestment was executed by affixing a copy at and upon the stern of the said sloop or vessel, she having yet no masts. After this arrestment, Ferguson, in conjunction with the trustee on the estate of Nairne and Company, who pretended to the property of the vessel, or at least a lien upon her in security of a sum advanced by them in part of the expence of building her, sold her to John Stein, who sold her to John Miller. Balfour presented a petition to the depute Admiral, praying that Ferguson might be imprisoned for breach of arrestment, and the other parties prohibited from carrying off the vessel, which they had by that time launched, till they found security to make it forthcoming. The Judge-Admiral, on the ground that the vessel belonged to the estate of Nairne and Company, assoilzied the defenders from this action.

Balfour advocated the cause; and the Lord Ordinary having remitted simpliciter to the Judge-Admiral, the cause came before the Inner-House by petition and answers. The Court had no doubt that the property of the ship remained with Ferguson, notwithstanding the transaction with Nairne and Company. But a question was raised about the validity of the arrestment.

It

It was pleaded for the defender, that Balfour's arrestment was null, because admiralty arrestments only applied to ships that were afloat, or at least capable of putting to sea, and were executed by fastening the copy on the mast; and that the regular way of attaching the vessel was by poinding.

For the pursuers, it was said, that this mode of admiralty arrestment was common, both of ships of which the masts were not yet built, and of boats that never had masts at all; and that it was sufficient, in order to make a vessel the proper subject of admiralty arrestment, that the building of her had gone so far that she was properly denominated a ship.

The interlocutor of the Court was: "Alter the Lord Ordinary's interlocutor; and find that the vessel in question was legally and effectually attached by the petitioner's arrestment; and remit to the Judge-Admiral to proceed accordingly."

On a reclaiming petition, with answers, they adhered.

Lord Ordinary, *Armaddle.* Act. *Baird.* Alt. *Monypenny.*
Agents, *P. Halkerston* and *G. Mill.* *Walker*, Clerk.

M.

No. LI. *June* 10. 1808.

BAKERS OF HADDINGTON,

AGAINST

JOHN SMITH.

BURGH-ROYAL.—EXCLUSIVE PRIVILEGE.—*A person not a member of the corporation of bakers in a royal burgh, who has a bake-house without the burgh, may send bread into the burgh to persons commissioning it from him, and that though they be retailers of bread within the burgh.*

THE Incorporation of Bakers of Haddington have by seal of cause the exclusive right of the baker craft within that burgh-royal. John Smith was not a member of that Incorporation. He had a bakehouse in Nungate, which is without the limits of the burgh. From this bakehouse, he sent bread to those within the burgh who commissioned it from him, and some of these persons were retailers of bread within the burgh. The Incorporation of Bakers, by their deacon and boxmaster, brought an action against him before the Sheriff, containing other matter, but chiefly concluding for having him prohibited from "*baking and* "*selling* bread within the burgh;" under which terms it would seem they

they included the practice above mentioned. The Sheriff-substitute found, " That the Incorporation of Bakers of Haddington have the ex-
" clusive right of manufacturing and selling bread within the burgh of
" Haddington: That it is an encroachment on their privileges as a cor-
" poration, in an unfreeman to manufacture bread without the burgh,
" and to sell the same by retail, or to retailers within burgh, unless
" on the weekly market-day; and in respect the petitioners have averred
" that the defender, an unfreeman, has been in the practice of selling
" bread manufactured by him without the burgh, not only to private fa-
" milies, but to retailers, and that every day in the week, and which
" averment the defender has not explicitly denied: Finds that he has
" thereby been guilty of an encroachment on the petitioners privileges
" as a corporation, and prohibits him in time coming from selling bread
" by retail, or to retailers, as aforesaid, within the said burgh."

The defender brought the interlocutor before the Court of Session by advocation.

The Lord Ordinary reported the cause on informations.

The pursuers confined their argument to maintaining, that selling to retailers was the same thing with retailing; and that retailing within burgh by an unfreeman, who was also the manufacturer without the burgh, was contrary to the incorporate rights of the freemen.

The argument for the defender did not dispute the last point, but denied the first; and maintained that an unfreeman might deliver within burgh the articles he manufactured without, provided they were previously commissioned, and not brought in *to be* sold by him.

On advising the informations, with a condesendence and answers, in which it appeared that the above was the state of facts in the case, a great majority of the Judges expressed their opinion, that it was now settled law that an unfreeman might bring in the articles that were the subject of an incorporated craft, into the burgh, and deliver them to those who had previously commissioned them from him. That they could see no reason why he should not deliver them in this way to persons who retailed them on their own account, as well as to other people; and, further, see no reason why he might not do this in any quantity, or in the way of a regular supply, provided always he had no share himself in the retail of them.

The interlocutor of the Court (10th June 1808) was: " Sustain the
" defences, and assoilzie the defender."

Lord Ordinary, *Craig*. Act. *James Keay*. Alt. *Thos. W. Baird*.
D. Steuart and *John Craw*, W. S. Agents. *B.* Clerk.

M.

No. LII. *June* 14. 1808.

CHARLES SELKRIG, Trustee on the Sequestrated Estate of HAY SMITH,

AGAINST

PITCAIRN AND SCOTT, and other Insurance Brokers.

INSURANCE.—*The bankruptcy of the insurer, while the risk is undetermined, does not give the insured a right to retain the premium, or employ it in making a second insurance.*

HAY SMITH was an underwriter at the offices of Pitcairn and Scott, &c. He accordingly had underwritten, at these offices, policies to a large amount, of which the risks were undetermined. In this situation he became bankrupt. No part of the premiums on these policies had at that time been paid. The brokers, on his bankruptcy, conceiving these contracts of insurance with him to be no longer binding, and wishing to secure the insured, made second insurances on the subjects of all these policies. In settling accounts with Mr Selkrig, who was appointed trustee on the estate of Hay Smith, these brokers gave Hay Smith credit for all the premiums in the policies above-mentioned which he had underwritten; but, on the other hand, they placed to his debit all the premiums which they had paid for the second insurances made on the subjects of the first policies,—alledging, that, as his bankruptcy rendered the first insurances void, the insured had a right to retain the premiums, and *a fortiori* to apply them towards making second insurances, in place of the first, which had failed *. Mr Selkrig refused to admit their claim of retention, demanding the full premiums, and offering to let them rank for the loss on the bankrupt's estate; and he accordingly brought an action against the different brokers for the premiums. These actions were conjoined.

The first interlocutor of the Lord Ordinary was,—"Finds it stated by "the defenders, that upon the bankruptcy of Hay Smith, which hap- "pened in the year 1801, they transferred the premiums of undetermin- "ed risks standing at his credit to the debit of the said Hay Smith, and "made second insurances upon those risks which had been underwritten "by him, placing the premiums to his debit: finds that these re-insur-

* In some cases it appears that the second premiums exceeded the first, but yet had been stated in full in the accounts to the debit of the bankrupt; but this seems to have been an inaccuracy not ultimately insisted on. The ultimate claim of the defenders seems to have been confined to retention.

" ances were either made for behoof of Hay Smith's estate, or were " double insurances made for behoof of the defenders, or of the assured, " their constituents: finds that, in the first case, the re-insurance was " ineffectual, in so far as not made with the concurrence of the pursuer, " the trustee for Smith's creditors, in terms of the act 19th Geo. II. ch. " 37.—and that, in the second, his estate cannot be affected by the ex- " pence thereof, which would be to create an undue preference to the " persons insured by Hay Smith, in prejudice of his other creditors: " finds that, though by subscription of the policy the underwriter be- " comes creditor to the broker for his premium, yet the broker does not " become his creditor for any losses, averages, or returns, that may eventual- " ly become due: so that there is no concursus of debit and credit entitling " the broker to retain or apply the premiums in his hands to a second " insurance, as in this case: repels the defences; finds the defenders " liable for the amount of the balances due by them, without deduction " of the premiums paid, or other expences incurred in consequence of " the re-insurances in question; and decerns."

On a representation and answers, the second interlocutor of the Lord Ordinary was,—" Having again considered this representation, with the " answers thereto, and whole process, the Lord Ordinary, however he " may have endeavoured to make up his own mind upon this cause, " yet considering it as of great importance in itself, and involving vari- " ous points, which have never, so far as he observed, been decided in " this country,—appoints the process to be enrolled, and recommends " to the counsel to consider, whether it might not have been expedient " that a case should be made up for the opinion of English counsel, or " of the committee of underwriters at Lloyds, stating this question,— " How far the creditors of an underwriter, becoming bankrupt dur- " ing the dependence of a risk, are entitled to rank upon the pre- " miums due to him?—2dly, What is the precise nature of re-insurance " and double insurance respectively, and how far the one description or " the other applies to the second insurances made in this case; as well " as upon any other point of law, or mercantile practice, which may " tend to throw light upon the merits of the present question*."

Agreeably

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* *Opinion of Mr Park.*

I am of opinion, that, by the law of England, the assignees of an underwriter, who has become bankrupt, may maintain an action against the broker, to recover the premiums upon all policies which he procured the underwriter to effect before his bankruptcy, notwithstanding the risks may be still depending. The contract is complete between the parties; and though the subsequent bankruptcy may occasion an inability to discharge the obligations of the underwriter *in part*, or perhaps *entirely*, still the contract is a valid subsisting contract, and the premium belongs to the estate of the underwriter, just as much as if he had continued solvent, and able to pay every shilling. The remedy of the assured is pointed out by the statute 19th Geo. II. ch. 32. § 2. which has authorised the assured, in case the underwriter becomes bankrupt, before a loss happens, to *claim*, and after the loss, to *prove* his debt, just as if the contingency had taken place before the bankruptcy. But the statute necessarily treats this as an existing contract; and I am of opinion that it follows, that the premiums cannot be diverted by the assured or broker into any other channel, such as effecting new insurances; but must be paid to the estate of the underwriter.

Opinion

Agreeably to this interlocutor, opinions of English counsel were taken. These learned gentlemen were all perfectly clear that, by the law of England, the bankruptcy of the underwriter, while the risk was undetermined, did not entitle the insured to retain the premium, but, on the contrary, that he must pay the premium to the bankrupt estate. That he may now, by virtue of statute 19th Geo. II. ch. 32. claim upon the bankrupt estate, for the loss, when it shall be ascertained, as if it had taken place upon the bankruptcy, but that even before (by that statute) he was entitled to do this, the premium still could not by the law of England be retained. One of these learned gentlemen gave the reason for this rule, viz. that the premium ought to be paid before signing the policy; and, though it be not paid, is presumed to have been paid, and the consequences are as if it had been paid; so that it becomes not a conditional, but an absolute debt, due to the insured by the broker or the insured.

2dly, They were equally clear, that, by the law of England, the brokers, or insured in this case, could not legally make a *reinsurance*, that being prohibited by statute 19th G. II. ch. 37. except to the *insurer* or his creditors. But farther, that the second insurances made here were not *reinsurances* but *double insurances*, which were good; but by which the first insurer, Hay Smith and his creditors, could not be in any way affected.

On

Opinion of Sir V. Gibbs, Baronet.

THE assignees of an underwriter, who becomes bankrupt in this country, are entitled to recover from the broker the premiums on all the policies which he procured to be underwritten by the bankrupt before his bankruptcy, although the risks may be still depending; and the assured are entitled, by the 19th Geo. II. c. 32. to make claim under the commission; and if a loss shall afterwards happen, to prove it in like manner as they might have done if it had taken place before the bankruptcy.

Opinion of Mr Serjeant Marshall.

The premium, as the word imports, ought regularly to be paid to each underwriter before he subscribes the policy. Every policy contains an acknowledgment of the receipt of premium, which has the effect of precluding the underwriter, in actions on the policy, from objecting that the premium had not been paid. The underwriter may however give credit to the insured, or to his broker, for the premium. But this indulgence cannot have the effect of rendering his right to it contingent, or of making it depend on his own future solvency. *Aliud est enim diem obligationis non venisse, aliud, humanitatis gratia, tempus indulgeri solutionis.* His subscription to the policy gives him a vested right to the premium, which can only be divested by the contract becoming void *ab initio*, or by the risk never having commenced. He has the same right to demand the premium when the accustomed credit is expired, as he would have had to retain it, if it had been paid when he subscribed the policy. For these reasons, I am clearly of opinion that the trustee, in behalf of the creditors of Hay Smith, is entitled to recover from the brokers the amount of the premiums due to the bankrupt, in respect of the risks which were undetermined at the time of his bankruptcy. A practice nearly similar to that which the brokers in this case contend for, has prevailed in France; but I have never been able to learn that it makes a part of the law of insurance in any other country. In England it is quite unknown.

On advising these opinions, the Lord Ordinary finally adhered to his interlocutor above mentioned.

The cause came before the Inner House on petition and answers.

Argument for the defenders.

The opinions of the English Counsel, it is admitted, do show that, on the whole of this question, an English Court would decide against the defenders. But this decision would rest not upon the peculiar rules of the law of insurance, but upon general rules in the law of England, forming no necessary part of the law of insurance, and diametrically opposite to the general rules of our law. It is a general rule of our law, that in a mutual contract, a party cannot demand implement of the obligation *de presenti* of the other party, if it appears that he would not be able to implement his own counter obligation *de futuro*; and this rule equally affects those who, by bankruptcy, come to take the place of either of the parties. They take the right and obligation of the mutual contract together, and cannot enforce the one while they leave the other not to be performed. Whenever it appears that the obligation on the one side cannot be performed, that on the other side becomes void. Such is one of the most important rules of our system, and of almost all systems of law except that of England. In England, a different general rule obtains. There a party in a mutual contract may insist for performance of the obligation *de presenti* by the other party, though it do appear that he will not be able to implement his own counter obligation *de futuro*, at least his creditors may take the *de presenti* right in such a mutual contract, and insist for performance upon it, though they leave the counter obligation *de futuro* to a certainty of non-performance. The mutual contractor, who is thus forced to implement of his own obligation *de presenti*, cannot, by the common law of England, even rank upon the bankrupt estate for the value of his corresponding *de futuro* right, but must make his claim when the period of *future* performance arrives against the debtor, who must then be totally denuded by the commission of bankruptcy. Cullen's Bankrupt Law, page 85. It required a special statute, 19 Geo. II. 32. 2. to provide a partial remedy to the evils arising from the operation of this general rule in cases of insurance. By that statute, the insured, though he must pay the premium to the creditors of the bankrupt insurer, is indulged with the privilege of ranking at least on the bankrupt estate for the amount of the loss, when it shall be ascertained, instead of being left to claim against the denuded bankrupt. Such is the general rule of the law of England in relation to mutual contracts and bankruptcy; and it is because that rule is a general law in England, that of course it applies there, in so far as not modified by statute, to cases of insurance as well as all other cases of mutual contract. It is no part of the peculiar law of insurance.

Insurance, in its own nature, is just a mutual contract like other mutual contracts, and it has shared the same fate that any other particular mutual contract, arriving among the general rules of English law, must have done.

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In the *first* place, there is nothing in the contract of insurance which makes the premium instantly pass out of the hands of the assured, either *de facto* or *de jure*.

As to the first, it is admitted in this case, that *de facto* the premiums were in the hands of the insured.

As to the second, the only foundation it ever was supposed to have in the law of insurance, was from the form of the receipt for the premium, which bears that it has been paid, though *de facto* it has not been paid at the time. This receipt it was supposed extinguished all claim on the part of the insurer against the insured, to whom an acknowledgement of payment was given. What the insurer got in payment on giving this receipt, was a new obligation to pay the premium by the *broker*, to whom alone therefore he had to look for payment. The broker, on the other hand, who thus granted his own obligation to the insurer for behoof of the insured, had a claim on the insured for the value of that obligation, that is, for the amount of the premium, and to him alone the insured was bound to pay.

In this way, the obligation on the insured to pay the premium had no connection with the obligation of the insurer to pay for the loss, because the former was due wholly to the broker, not at all to the insured; and the latter was due wholly to the insured, not at all to the broker. But this arrangement, though it once was supposed to be the law of insurance, has not been received as such in this country, or even in England.

If this had been strictly the law, it is clear that the insurer never could have been entitled to recover the premium directly from the insured, he must have looked to the broker alone, and the insured must always have paid to the broker. If then the broker became bankrupt, his creditors must have received the premiums as a debt due to him by the insured; and the insurer could only have ranked on the broker's estate for the amount of them, as a distinct debt due by the broker to him. But this is not the rule of the law of England. See opinion of Mr Wood in the case Bertram *versus* Richmond and Freebairn's Trustee, 26th November 1802, Fac. Col. *. By this opinion, and by that case

 decided

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* *Opinion of Mr Wood.*

I take it to be clear, that by the law and practice of England, the underwriters are entitled to receive from the assured all such premiums as the broker had not actually received at the time when he became bankrupt; and that it makes no difference whether the broker do or do not receive a premium for guarranteeing the premium to the underwriters. The premiums in the hands of the insured unpaid are the property of the underwriters, and can only be sued for in the names of the underwriters; neither the bankrupt nor his assignee could sue for them, and consequently they form no part of the bankrupt's estate to be distributed amongst his creditors. His guarranteeing them may give the underwriter an additional security, but does not deprive him of the remedy the law gives him against the insurer, who has not paid over the money to the bankrupts. I do not know of any determination reported in any printed collection, directly in point with the present case. The principle will be found in a series of cases in Cooke's Bankrupt Law, p. 414. The case of Robson v. Wilson was argued before the Court of King's Bench in May 1798, by Mr Chambre and myself. Mr Chambre argued that case on the footing of partnership, and I followed the same line of argument in my answer; but the Court decided in favour of the plaintiff, upon the principle above stated, viz. That as the premiums

decided on that opinion, it is the law both of England and Scotland, that the premiums are due by the insured, not solely or principally to the broker, but to the insurer; and that if the broker becomes bankrupt, the insurer is entitled to claim them himself, without the intervention of the broker at all. There is an end, therefore, of the supposed arrangement in the contract of insurance, by which the obligation of the insured to pay the premiums became absolute and independent of the counter obligation of the insured to be answerable for the loss. This supposed rule of the law of insurance rested entirely on the idea of the premium being due solely to the broker, and as it is not due solely to the broker, there is no longer any foundation in the peculiar form or law of insurance for this rule. It may remain in England by virtue of other general rules of their law of mutual contract and bankruptcy, but there is no reason why we should adopt these in opposition to our own law of mutual contract and bankruptcy.

Accordingly, there is a series of decisions, finding that this part of our law did hold good in cases of insurance, and that contracts of insurance became wholly void, when, by the bankruptcy of the insurer, his obligation to answer the loss could not be performed, and when the insured declared the bargain at an end, by making a second insurance on the same subject.

The insured was not held bound even to wait till the creditors had determined whether they would undertake the burden of the contract or not. Creditors of Elliot against Morison and Co. 28th June 1785;—Keith against Thomson and Son, 3d July 1795.

According to the principle established by these cases, the defenders, acting as agents for the insured in this case, declared the contract at an end on the bankruptcy of the insurer Hay Smith, and effected a second insurance on the same subject. To this they applied the premiums of the first; and to this they were entitled to apply them, as the first had become void, and the second was a legal insurance in all views, whether the first had been void or not; since the opinions of the English counsel show that it was not such a re-insurance as is prohibited by law.

Argument for pursuers.

In a question depending on a point of mercantile law, the desire of rendering the decisions on our law here uniform with those of the Courts of England, where that law has been so much longer known, and so much more fully considered, has always been the paramount principle in the minds of our Judges. The opinions of the English counsel, therefore, must be conclusive in the present case.

It

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premiums had not been paid over by the defendant to the brokers, who had become bankrupt, the plaintiff, the underwriter, was not bound to come in as a creditor under the commission of the bankrupt, but was entitled to recover the whole of the premiums against the defendant. This case is not reported; but Mr Meggison, who was the defendant's attorney, has a note of the judgement of the Court, which I have seen.

It is a mistake to say, that these opinions are founded on any general rules of the laws of England. They are strictly confined to the *law of insurance* arising out of the form of that contract, to which form, and not to any general rules of English law, they refer. They are demonstrative, therefore, of the mercantile law of insurance, which is not more the law of England than of this country. By this mercantile law, the Courts of Scotland must be guided in cases of insurance, though it were contrary to our general rules relative to contracts; but in truth it is not contrary to these rules, since it only applies to contracts of a form quite different from any of those to which these general rules ever were held applicable.

By the contract of insurance, the premium ought instantly to be paid. But though *de facto* it is not paid, yet it is held to be paid. The insurer grants a receipt for it; and on the policy he is precluded from pleading that it is not paid. His obligation is rendered absolute; the responsibility for the loss has no dependence on the future payment of the premium. In the same way, his claim for the premium is rendered absolute, and has no dependence on his responsibility for the loss. It is just as if he had received the money, for which he granted the receipt, and then lent it back again to the insured. All this arises from the peculiar form of this transaction, which is quite different from that of a common mutual contract; and accordingly, to this form, and not to the general law of England, this rule of the law of insurance is by the English counsel ascribed. See opinion of Serjeant Marshall particularly.

The law of mutual contract, therefore, has no application to this case. In it there is no mutual contract now existing. The original obligation to pay the premium, which was the counter part of the obligation to answer the loss, is extinguished by the receipt; and in its place is substituted a new and absolute independent obligation, for a sum to the amount of the original premiums for which receipt was given.

Neither the insured nor insurer, then, can plead the law of mutual contract. The one cannot refuse to answer the loss, because the premium is not paid, nor can the other refuse to pay the premium, because the loss will not be answered. The creditors, therefore, of the insurer are entitled to demand the premiums, without any regard to the future responsibility of their debtor, the insurer, for the loss.

This rule, it will be observed, does not rest at all upon the intervention of the broker, nor is it rested upon that by Serjeant Marshal; whether the broker therefore be the only creditor for the premiums to the insured, and the only debtor for them to the insurer or not, is of no moment to the pursuers plea. If there had been no broker in this case at all, if the action had been directly against the insured, it would still have been perfectly good.

It is however by no means clear, that by the law of insurance in England, (and our law of insurance must be the same,) the broker is not the proper and only debtor to the insurer for the premium. The case quoted in Mr Wood's opinion, and in which that opinion rests, where, in consequence of the broker's bankruptcy, an equitable exception seems to have been admitted in favour of the insured, will by no means go the length of establishing that, in all cases, even where the broker is solvent,

solvent, he is not the true debtor to the insurer, and creditor to the insured.

This is the rule that is universally understood to prevail among mercantile men, both in England and here.

If such be the rule of law, it must decide this case; for here the defenders are not the insured but the brokers, who must be bound to pay the premiums to the insurer or his creditors, without the pretence of a retention for a claim of responsibility not due to themselves but to the insured.

The second insurances, effected by the defenders, are circumstances of no importance at all in this case; whether they are reinsurances or double insurances is of no moment. If the defenders had no right to retain the premiums, they could have none to apply them to purchase second insurances.

One Judge observed, that the question seemed to resolve into this point, whether the general rules of our law, in relation to mutual contract, should yield to those of the law merchant in cases of insurance; that he doubted whether we should not adhere to our own common law principles; that the obligation to make real payment of the premium was plainly a part of the transaction; and, therefore, the insured, if the insurer became unable to fulfil his part, had, by the law of Scotland, a strong plea to be free of this counter obligation. The rest of the Judges who spoke adopted the argument of the pursuer.

The interlocutor of Court was, "adhere to the interlocutor of the Lord "Ordinary."

The defenders reclaimed against this interlocutor; but the Court, (14th June 1808,) "Adhered."

Lord Ordinary, *Hermand.* Act. *Ad. Gillies.* Alt. *Dav. Cathcart.*
R. Aytoun, W. S. and *A. Kid*, Agents. *Scott*, Clerk.

M.

No.

No. LIII. *June* 15. 1808.

ROBERT DAWSON,

AGAINST

SIR JAMES PRINGLE.

ANNUALRENT.—STIPEND.—*Interest is due on arrears of ministers augmented stipends, from the date of the process of augmentation to that of the decree of locality, without any charge upon the former decree, or even demand of payment, during that time.*

THE Reverend Robert Dawson, minister of Stow, raised a process of augmentation in the year 1778, and obtained an augmentation. In the year 1795, he raised a second process, and obtained another augmentation. No decree of locality, however, was pronounced in either of these processes till the year 1802. During all this interval, from the date of the summons of augmentation to that of the decree of locality, the minister never received payment of any part of his augmented stipend. He never gave any charge to the heritors to pay it, nor did he ever make any demand for payment of it. But after the decree of locality, he demanded from each of the heritors payment of his proportion of the arrears of this augmented stipend from the two periods of augmentation, and he also demanded interest of these arrears from the dates when they became due. Sir James Pringle refused to pay his proportion of this interest; and Mr Dawson brought an action to compel him to pay it. He also threw in a conclusion for periodical interest on some arrears of old stipend, on which no charge had been given or demand had been made, and another for interest on the aggregate sum, not only of capital, but even of interest, since the date of citation in the action.

The Lord Ordinary reported the case on informations.

Argument for pursuer.

Without maintaining that interest is due on all debts, the pursuer has various grounds in which, in this case, he is entitled to demand it upon the arrears of his stipend.

Point I. New stipend.

1*st*, This stipend, when modified to the pursuer, was by the decree of modification ordained to be paid at certain terms; and decree to this effect was pronounced against the heritors. This individual defender, to be sure, was not ordained to pay a certain sum till the decree of locality was pronounced, but he was bound to bear his share of the general obligation of the heritors, when it should appear what that share was. This general obligation was to pay the stipend at the legal terms; on failure, it became an obligation *ex mora* to pay interest from these terms; and as the defender's share of this obligation is now fixed, he *must* fulfil it.

2*dly*, Interest is payable by those who are *lucrati*, by the use of money due to another person, when there is no delay on his part to demand it, *Durie*, 17th Feb. 1624, Laird of Durie, 28th Jan. 1663, Lord Balnagown, *Stair*. Now, in this case, the defender certainly is, or ought to be, *lucratus*; and there has been no delay to demand payment on the part of the pursuer, because he had a perfectly good reason for waiting till the process of locality was determined. He wished not to impose a hardship on any of the heritors. It would be particularly hard if the defender was to be allowed to take advantage of this forbearance to keep in his own pocket that interest which otherwise would have been in that of the pursuer. The only consequence of adopting such a rule would be, that all ministers would have immediate recourse to charges against one or other of the heritors whenever they got a decree of augmentation.

This very point was determined in the case of Wright against Kennedy, 18th December 1804. There the augmented stipend was withheld for five years, in consequence of the dependence of the process of locality; and the Court found the minister entitled to interest.

The case of Anderson against Urquhart was to the same effect. There to be sure, a charge was given on the decree of modification, but no denunciation followed, so that interest was not due by statute 1621. The charge, therefore, could make no difference. It was the situation of the parties which was held equivalent to the requisites of the act 1621.

Point II. Old stipend.

As to the old stipends they were clearly due at the terms; and, therefore, interest must be due *ex mora*.

Point III. The claim for interest on interest was scarcely insisted on.

Argument for the defender.

Point I. Interest upon debts is not due in general by our law; it is only due by agreement, by particular statute, or act of sederunt, or by common law, on account of a *mora* in the debtor, peculiarly blameable. But in the present case, there is no agreement, no statute or act of sederunt,

runt, and no *mora* at all on the part of the debtor. There never was even a demand made against the defender for payment of this debt, so that it is absolutely impossible to accuse him of *mora;* on the contrary, there was *mora* on the part of the pursuer in not demanding payment.

But, 2*dly*, The pursuer can have no claim to interest, because he has neglected to give a charge to any of the heritors for payment on the decree of modification, and to denounce on that charge, according to act 1621, c. 20. This is the process pointed out to him by the law for obtaining payment or interest. If he had used this, he would have been by law entitled to interest. But as he has neglected this legal compulsitor, he has himself to blame that interest is denied him by the law. In this respect, his case is similar to that of all other ordinary creditors: It is a stretch in the law even to allow this privilege to ministers, since the heritor charged is really not properly bound to the whole extent. The law, however, indulged ministers so far; but there is no reason to say it intended to go farther, and give them interest without any charge at all.

It is true, in the case of Anderson, *denunciation* was found not necessary to constitute a claim for interest, but that was because the heritor had himself rendered it impossible by suspending the charge; and as the suspension was found to be groundless, he was not held entitled to take any benefit by it.

It is not even pretended that in any case interest was found due on ministers stipends without a charge at all, except in that of Wright against Kennedy, which is not reported; because the reporter expressly says it was a special case, and decided on specialties by the majority of the Court.

Such a charge is peculiarly necessary in this particular case. For here, till so charged, an individual heritor is really not *in mora* at all, nor can reasonably pay any thing, because the sum truly due by him is not known; and it is the charge only which lays him under any obligation to pay the whole augmentation, in so far as his free teinds go. It never was supposed that, without this charge, any one heritor was bound to take the whole augmentation on himself.

Point II. As to the second claim for periodical interest on the arrears of old stipend, it is impossible to imagine any reason why periodical interest should be given upon ministers stipends more than upon arrears, feu-duties, annuities, or rents; yet it is notorious that no interest is ever given on these prior to a demand for payment of them.

Various opinions were expressed on the Bench on the first point relating to the new stipends. One Judge went solely upon the ground that the question had been decided already; and that in cases of this nature it was of more moment to have a steady rule than strictly to examine the original propriety of the rule. Several other Judges thought that on this subject our law was very different now from what it had anciently been. That anciently interest was reprobated; now it is given in almost every case. That though there may be exceptions in cases where payment is refused or delayed *bona fide*, yet the general rule is to give interest. That in this case there was no dispute as to the debt. The heritor knew

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he was keeping money that was due to the minister; and he knew very nearly his proportion, so that he could stock it out for the minister. That he must in fact have done so; he must have pocketed interest on it; and therefore ought to pay over this to the minister. That it would be inexpedient to force ministers to have recourse to the odious measure of charges to individual heritors in all cases, and unjust to let them suffer from their unwillingness to use such a measure.

The Lord President expressed his opinion that this was not properly a question of debt; there was here no giving of credit,—no borrowing; it was a case of *intromission*. That teinds originally belonged to the clergy, and were drawn by them. That afterwards the heritor got a right of drawing his own teinds, but under the condition that he should pay the minister's stipend: That to that extent the heritor is an intromitter with the estate of the clergy: That interest, therefore, must be due on these intromissions, as it is on all intromissions; for instance, on the intromissions of a factor: That these must either be paid over to the constituent, or laid out at interest for his behoof: That a period is fixed by law for doing this in the case of stipends, viz. the term of Candlemas: That the minister has nothing to do with the process of locality, which is entirely the concern of the heritors: That when the burden of the stipend is laid on the whole teinds, it is their business to arrange the proportions in which they are to pay it, by an interim locality, or in any other way they please, till they get it fixed by a final decree of locality: That no doubt each of them is liable to the minister for the whole stipend to the amount of the teinds he draws, till he can shew another who is preferably liable by the decree of locality; but that it is reckoned an oppressive and odious thing for the minister to charge one heritor for the whole, and there is no good reason for obliging him to do this, by denying him interest on his stipend, unless he does it.

As to the second point, It was held by the majority of the Judges to be very clear that interest must be due. It was observed that, in cases of this sort, there was no need of a demand to constitute a right to interest. That the maxim, *lex interpellat pro homine* applied.

On the other side, several Judges observed that there could be no right to interest on the old stipend, without a demand, nor on the new stipend, without a charge or a decree of locality. That in the latter case, the heritors could not pay, if willing, nor deposit the money; and it would be unjust to hold them liable for full legal interest, while they were forced to keep the money, and could not draw that interest on it without some risk, of which the minister did not relieve them.

On advising informations, the judgment of the Court was, "Sustain "the defences, in so far as regards the pursuer's claim for interest upon "the amount of his periodical interest; but, *quoad ultra*, repel the de- "fences; and find the defender liable to the pursuer in payment of the "following sums, viz. first, of L.28. 5s. $8\frac{1}{12}$d. Sterling, being the prin- "cipal sum of augmented stipends from the 1778 to the 1803 inclusive, "with the legal interest thereof from and since the term of Candlemas "1804,

" 1804, till payment; *secondly*, of L.13. 12s. 11$\frac{8}{12}$d. Sterling, as the " amount of periodical interest due upon the said sum at and preceding " the said term of Candlemas 1804; and, *thirdly*, of L.16. 14s. 1$\frac{6}{12}$d. " Sterling, as the balance of old stipend, including interest due thereon at " said term of Candlemas 1804, conform to the state in process, and of " the interest of so much of said sum as is principal, from the said term " of Candlemas 1804, till payment."

And on advising a petition against this judgment, with answers, the Court, by a majority of nine to five, adhered.

Lord Ordinary, *Glenlee*. Act. *Norman Hill*. Alt. *David Monypenny*.
H. Davidson & Wm. Walker, W. S. Agents. *Pringle*, Clerk.

M.

NO. LIV. *June* 17. 1808.

MAGISTRATES OF ABERDEEN,

AGAINST

JOHN BURNETT of Countesswells.

SUPERIOR and VASSAL.—*A singular successor of the vassal, in a feu on payment of one year's rent to the superior, (a royal burgh,) has a right to demand a charter to himself and heirs whatsoever, though the charter of his author was to heirs male, burgesses of that burgh, with a clause in the reddendo, that they should perform burgh services, and that the fee should not devolve on the feminine sex.*

IN the year 1764, the town of Aberdeen granted a charter of the lands of Countesswells to George Chalmers. This charter was in an ancient form; accordingly it conveyed the lands " to George Chalmers " merchant in Edinburgh, burgess of Aberdeen, his heirs male and as- " signees, burgesses, brethren of guild, and actual indwellers within the " burgh of Aberdeen, using and frequenting the trade and interchange " of merchandise within the same," &c. And in the *reddendo* it declared, " That the said George Chalmers, his foresaids, shall be subject,

" and subject themselves, to the courts, suits, and jurisdictions of the " Magistrates of this burgh; and that they shall perform and give due " obedience to the officers and governors of the same, conform to the " customs of the citizens and inhabitants thereof; and that it shall not " be in the power of the said George Chalmers, or his foresaids, for the " future, to enjoy two lands, or two fishings, cruive, or whole nets sal- " mon fishing, holden of us at one and the same time; and that the " said lands and others above mentioned, with the pertinents, shall " nowise devolve to the feminine sex, upon any law or pretence whatso- " ever," &c.

George Chalmers sold these lands to Mr Burnett, who, without getting an entry from the superior, transmitted his right to his son John Burnett. George Chalmers died; and the town of Aberdeen brought an action of declarator of non-entry against John Burnett. He offered to enter, and to pay one year's rent as a singular successor, but demanded a charter with a destination to himself and his heirs whatsoever. This the Magistrates refused to grant, unless, in addition to the usual allowance of one year's rent for entry, he would pay another year's rent as a fine or composition for this change from the old form of the charter of the vassals in these lands.

The interlocutor of the Lord Ordinary was, " Finds, that if the de- " fender, John Burnett, requires a charter to a different series of heirs " from those contained in the former investitures, he must pay the two " years rent demanded by the pursuers."

The defender reclaimed. On advising his petition with answers, the interlocutor of the Court was, " Alter the interlocutor reclaimed against, " and find that the petitioner, John Burnett, is entitled to be entered as a " singular successor in the usual manner, on payment of the composi- " tion of one year's rent only."

The pursuers reclaimed; and their petition, with an additional petition, was answered.

Argument for pursuers.

The pursuers admit that a singular successor has, by the act 20th Geo. II. a right to demand, on payment of one year's rent, a charter to himself and heirs of line, though his author had a charter with a destination to heirs male; and the reason is, that a superior has no interest in the form of a mere destination.

But the clauses in the investiture of Countesswells do not contain a mere destination; they are conditions of the feu. Under these express conditions, the town are authorised to grant feus of their lands by their own charter from Queen Mary in 1555; and accordingly have universally inserted them in all their feu charters; nor has any of their vassals ever pretended to get quit of them without the consent of the town. In these conditions the town have a valuable interest; and at any rate they are part of the feudal contract essentially affecting the right of the vassal. Singular successors, therefore, must take that right as it is, and cannot expunge the conditions of it without the consent of the superior.

Stair,

Stair, L. ii. tit. 2. § 10.—Bankton, B. ii. tit. 3.—Ersk. B. ii. tit. 3. § 11.

These clauses do not fall under the act 1st Geo. I. ch. 54, because that act, which was made after the rebellion 1715, related only to personal services of a warlike nature, that gave feudal authority to superiors. This was found in the case of Sir Harry Munro of Foulis against M'Kenzie, 20th June 1763, where a condition in a charter of delivering peats was found not to fall under the act; and in the case of the Duke of Argyle against Tarbet, 5th February 1762, where a condition of furnishing a boat and rowers to the superior was found to be equally valid.

Nor do they fall under the act 20th Geo. II. ch. 50, abolishing ward-holdings, and taking away clauses *de non alienando*. They do not prohibit, but allow the alienation of the fee under its conditions. They are of the same nature as a clause of pre-emption, which does not allow absolute alienation; yet, in the case of Sir Charles Preston against Earl of Dundonald, 20th Dec. 1781, it was found that a condition of pre-emption did not fall under this act.

The case of Governors of Heriot's Hospital against Ferguson, 30th July 1733, is not in point, since that went upon an interpretation of the intention of the granter of the charter; and that of Johnston against Magistrates of Canongate, 30th May 1804, was of the same description.

But if the other conditions of this feu are legal and valid, that of the exclusion of heirs-female must stand along with them, since on it the others depend for their effect.

It is not, therefore, a destination, but a proper and legal condition of the feu.

Argument for defender.

The conveyance to heirs-male, in the dispositive clause, is plainly a mere destination, made just like all other destinations in charters. There is no clause of return to the superior, nor any clause *de non alienando sine consensu superioris*, so that the fee was completely granted away, and this could be no more than a mere nomination of heirs.

The exclusion of females in the reddendo is of the same nature, and for the same reasons.

Indeed, if it had been an absolute limitation of the feu, it would have been invalid; for law never did, nor does, admit a clause simply excluding women, by which a woman purchaser or adjudger would be excluded. A clause might as well be introduced, simply excluding men or children, or clergymen, or soldiers, &c. or simply excluding all but people of a certain family, and in a certain series, which would just be a strict entail. But entails cannot be made by clauses of this sort in a reddendo.

The other clauses are quite consistent with this view.

A destination was sufficient to support them originally, for they were binding while a male was in the fee; and when they were made, (prior to the act 20th Geo. II. ch. 56.) the destination to heirs male could not be

be changed without the superior's consent, for no singular successor could regularly be admitted without his consent. The act of Geo. II. took away the power of refusal, but it gave the superior a full year's rent as an equivalent. Then, to be sure, the other clauses became less applicable, but they still are not wholly inapplicable, if they were in their own nature valid; and it is not to be supposed that the defender, after paying a year's rent, in terms of the act of Geo. II. is to be refused a charter to himself and heirs of law, merely because there was an old destination to heirs male, and some clauses made upon the notion that this was not to be changed.

As to these other clauses, the defender has nothing at present to do with them. He regards them as obsolete and ineffectual; but he does not insist to have them struck out of the investiture, because he thinks they are not inconsistent with a destination to heirs whatsoever.

If, however, they were of any consequence, they are invalid, and might be thrown out of the investiture; 1*st*, Because they are noxious to the vassal, and useless to the superior; 2*dly*, Because they are abolished, at least on payment of a trifling fine, by act 1st Geo. I. ch. 54.

The first reason was sustained in the case of Heriot's Hospital against Ferguson; for it is absurd to say "the ordinary labour of the plough "and spade" could be interpreted into building a huge pile of houses; and in the case of Johnson against Magistrates of Canongate, which could as little be justified by mere interpretation. It will be observed, too, that the pursuers themselves regard that part of their own Crown charter, which enjoined the insertion of these clauses, as nugatory, since, without asking leave of the Crown, they offered to strike them out if paid for so doing.

2*dly*, All these clauses fall under the act 1st Geo. I. ch. 54. because they are *personal services*. Watching and warding, obeying Magistrates residing in the town, being of a trade, &c. are strictly personal services. The case of the Duke of Argyle and Sir Harry Monro are not in point; for furnishing peats or a boat are not personal services, but mere prestations, having no connection with the vassal's person.

On advising this petition and answers, the Court ordered the defender to give in a minute, stating explicitly on what terms he would receive a charter from the town; and the pursuers to answer it. He gave in a minute accordingly, stating that he would be content to receive a charter similar to that of Mr Chalmers, excepting, first, that the words, on the dispositive clause "heirs-male and assignees, burgesses, brethren "of guild, and actual indwellers within the burgh of Aberdeen, using "and frequenting the trade and interchange of merchandize within the "same," should be left out, and the words "heirs and assignees what-"soever," be inserted in their stead. And that the words of the reddendo, "that the said lands and others shall nowise devolve to the fe-"minine sex upon any law or pretence whatsoever," should also be left out. In answer, the pursuers refused to grant such a charter for one, or less than two years rent.

On again advising the reclaiming petition for the pursuers, with answers, along with the minute for the defender and answers to it, it

was

was observed on the Bench, and seemed to be the opinion of the majority, that the whole clauses in the charter were ineffectual now: That, in so far as they required personal service, they fell under the act of Geo. I. and where they did not require this, but created restrictions on the vassal in the use of the fee without service to the superior, they were void on the principle of the decision in the case of Heriot's Hospital against Ferguson: That notwithstanding this, the superior might perhaps be allowed to retain the rest of these clauses in the investiture, *valeant quantum*, though it was not necessary to determine that now; but as to the destination of succession in the fee, when the act 20th Geo. II. c. 50. allowed free alienation to singular successors, under certain regulations adjusted by an act of sederunt 10th March 1756, it was impossible the superior could pretend any right to retain that, and it must be made such as the singular successor, paying a year's rent for a charter, chose to make it.

On the other hand, several Judges thought that the clauses did not fall under the act of Geo. I. and that a singular successor had no right, by the act of Geo. II. to insist for any thing more than this, that his own name should be substituted in place of the name of the former vassal, leaving the whole form of the charter untouched, or, at the utmost, that a mere regulation of the succession, which had been inserted by the vassal for his own pleasure solely, might be changed by a singular successor; but that no clause which had been put in by the superior could be taken out by the vassal, whatsoever might be its effect.

The interlocutor of Court was, (17th June 1808,) "Adhere to the "interlocutor reclaimed against, in so far as to find that the dispositive "clause of the charter must be to heirs and assignees whatsoever; but "of consent alter their interlocutor as to the other provisions of the "charter, and allow them to be inserted in the investitures; reserving "to the vassal all legal objections to their validity, as accords."

Lord Ordinary, *Craig*. Act. *John Burnett*. Alt. *J. H. Mackenzie*.
Masterton Ure and *Alex. Grant*, W. S. Agents. S. Clerk.

M.

NO. LV.

June 17. 1808.

ALEXANDER LAMONT trustee on the sequestrated estate of LAMBERT and Company,

AGAINST

ROBERT and WILLIAM STEWART.

BANKRUPT.—*Imprisonment in terms of act* 1696, *what? Similar to case of Ewing against Jamieson*, 17*th May* 1808.

BENJAMIN LAMBERT granted, on the 16th August 1802, to Robert and William Stewart a disposition of his heritable subjects, on which they were infeft the same day. Lambert's estate was sequestrated on 30th of December 1802, and Alexander Lamont was appointed trustee on it. He raised a reduction of the disposition by Lambert to the Stewarts, under the act 1696, on the grounds, 1*st*, Of Lambert's insolvency at the date of it; 2*d*, Of its being granted in security of a prior debt; and, 3*dly*, Of Lambert's having been imprisoned on a caption in the sense of the act 1696, within sixty days of the date of the disposition.

In defence, the Stewarts denied the two last circumstances.

A proof was allowed by the Lord Ordinary; on advising which, his Lordship pronounced this interlocutor: "Finds it sufficiently instructed "that Benjamin Lambert was rendered bankrupt in terms of the act "1696, upon the 30th day of August 1802, within sixty days of the "conveyance under challenge, which was granted on the 16th day of "the said month of August and year foresaid; therefor, sustains the "reasons of reduction, repels the defences, and decerns in terms of the "conclusions of the libel."

This interlocutor was brought under review of the Inner-House by the defenders.

The fact of the disposition being granted in security of a prior debt was disputed. But the majority of the Court did not think it necessary to go into the evidence on that point.

As to the imprisonment of Lambert, the facts appeared from the following depositions.

Allan Fullarton depones, "That during the year 1802, the deponent "was in partnership with James Macrome messenger in Glasgow: That "towards the end of the month of August of that year, there was put "into the hands of the deponent and his partner, a caption at the in-"stance of David Allan, jun. and Company, against Benjamin Lambert "and Company: That, as far as he recollects, the instructions given him "by the creditors were to go to Kilmarnock and get a settlement with "Benjamin Lambert, on the best terms he could, either by payment or "security:

" security: That the deponent went to Kilmarnock on a Sunday, the 29th " of August, for the sole purpose of getting the said settlement accomplish- " ed: That he did not see Benjamin Lambert on the Sunday evening, but " found him at home early on the Monday morning, when he informed the " deponent that he was so embarrassed in his circumstances, that he " could neither pay the debt nor find security: That upon this the de- " ponent informed Lambert he behoved to come to Glasgow with him, " which he readily agreed to do: That the deponent remained in Lam- " bert's house till they set out for Glasgow, and breakfasted with him: That " Lambert did not, during the interval, leave his house, but may have " gone into another room to dress, although the deponent does not re- " collect whether he did so or not, and the deponent all along consi- " dered that he had Lambert in his custody: That the deponent rode " with Lambert on horseback to Glasgow: That on arriving at Glasgow, " the deponent might call with Lambert at his own office, but does not " recollect whether he did so or not; and he is certain that very little " delay took place before he carried Lambert to the counting-office of " the creditors: That on reaching the counting-office, a good deal of con- " versation took place between the creditors and Lambert, which he " does not distinctly recollect, further than it related to the assignment " of a policy by Lambert to the creditors: That after remaining about an " hour in the counting-house of the creditors, the deponent was desired " by them to liberate Lambert. Interrogated for the defenders, depones, " That he had the caption with him when he went to Kilmarnock: That " he does not recollect whether he showed it to Lambert or not, only " he thinks it highly probable he did, but he did not read it over to " him; the witness adding of his own accord, that it is never his prac- " tice to read over his caption to a debtor: That the deponent did not " display his blazon to Lambert, nor did he touch him with his wand " of peace, and say that he was his prisoner, in so many words, but " gave him to understand that he was so." And being shown the cap- tion No. 13. of process, and interrogated for the pursuer, depones, " That " he believes it is the caption before mentioned; and he is certain Lam- " bert knew he was a messenger, at least, he once before waited on " Lambert with diligence for the purpose of procuring a settlement."

James Macrone messenger in Glasgow, depones, " That he recollects " that towards the end of the month of August 1802, a caption at the " instance of David Allan, jun. and Company, was put into the hands " of him and his partner Allan Fullarton, to execute against Benjamin " Lambert and Company of Kilmarnock: That his said partner according- " ly went to Kilmarnock for the sole purpose of apprehending Benjamin " Lambert." And being shewn the caption No. 13. of process, depones, " That it is the caption above mentioned, and that the marking on the " back thereof is of his hand-writing: That his said partner on the 30th " of August, which he thinks was a Monday, (which he recollects from " having inspected his books,) brought the said Benjamin Lambert to " Glasgow, to the office of the deponent and his partner, when the de- " ponent saw him in the custody of his said partner; and the deponent " saw the said Benjamin Lambert leave the deponent's office along with

" his

" his said partner, for the purpose of going to the counting-office of the " creditors, and the deponent learned from his partner when he return- " ed, that the said creditors had accepted of some draft or bill, and had " liberated Lambert." The deposition of Alexander Allan, merchant in Glasgow, was sealed up, but was afterwards opened by consent of parties. He depones, " That during the year 1802, his warehouse was imme- " diately adjacent to the counting-house of David Allan, jun. and Com- " pany; and he recollects that towards the end of the month of August " that year, he thinks on the 30th of that month, David Allan, jun. " came into his warehouse and informed him that Allan Fullarton, mes- " senger, had brought Benjamin Lambert from Kilmarnock, and that " the latter was then in the counting-house of David Allan, jun. and " Company: That upon this the deponent went into the said counting- " house, where he saw the said Benjamin Lambert and Allan Fullarton, " and was informed that Mr Lambert had been brought from Kilmar- " nock, and was then in custody. And farther, that the said David Allan, " jun. expressed his surprise that Mr Lambert had been brought from " Kilmarnock; and upon the said David Allan, jun. asking the depo- " nent's advice, whether they should put Lambert in the goal of Glas- " gow, the deponent advised him that, rather than incarcerate Lambert, " to endeavour to get payment of the debt in goods, or get security; " and, accordingly, David Allan, jun. and Company, followed the depo- " nent's advice, and liberated Lambert upon his promise that a Mr " Haddow of Glasgow would pay them a loss due to Lambert, as " soon as it was recovered from the underwriters; and the deponent is " certain that Lambert was detained at least an hour on the above oc- " casion in the counting-house of David Allan, jun. and Company."

On these facts, it was argued,

For the defenders, there was in this case no execution of the caption at all. The messenger did not read it;—it does not appear he even shewed it to the debtor,—he did not display his blazon,—he did not touch the debtor with his wand of peace,—he did not even say, " you are my pri- " soner;" but all these things are necessary to the execution of a caption. Duty of a Messenger, page 6, Erskine, b. 4. tit. 4. § 33. There was a mere notice that the messenger had a caption, and a proposal that the debtor should go with him, not to jail, but to Glasgow. There was, therefore, no legal custody, nor even legal apprehension; there could have been no deforcement; the debtor was still free to escape if he could.

But neither the case of Woodston, nor any subsequent decision, has gone the length of finding that imprisonment, under the act 1696, can be constituted without legal custody, founded upon a valid execution of the caption in proper form, (see cases quoted in case of Ewing against Jamieson.) It may well be doubted if these decisions were founded in an accurate view of Scotch law, and the rule they establish will certainly not be extended.

The mere circumstances that the caption was mentioned to the debtor, and that he went with the messenger, are quite ambiguous. They might have taken place though it had been expressly resolved and understood by all parties that there was to be no custody or execution of the caption whatever.

If

If then it is said that there may be custody, without any other circumstance to mark it, this must depend on the mere opinion of the messenger, who may say he intended to take the debtor into custody, or did not, just as he pleases.

But it would be highly dangerous to trust the important fact of bankruptcy to such evidence. A plain and certain test of it was undoubtedly in the view of the statute 1696, and even of the House of Lords in the case of Woodstone. That case had in view custody in itself public, and, at all events, legal custody on a regular certain unambiguous execution against the debtor.

But, in this case, there is not even any appearance of an intention to take the debtor into custody, for the instructions were merely to get a settlement by payment or security.

For the pursuer.

Captions are generally executed, not for the purpose of constituting bankruptcy, but to inforce payment of debt. The creditor, using the caption, has no interest to give any solemnity or publicity to this execution which he can avoid, but rather the contrary, since that would only tend to bring other creditors into the field against him; and all such publicity must be very offensive to the debtor. Accordingly, it is the invariable practice of messengers to execute captions with as little shew as possible. They do never now, in practice, use the solemnity of the baton, blazon, touch of the wand, or reading of the caption, nor even call in witnesses unless there is resistance. Where the debtor, who is previously warned by the charge of horning, on seeing the messenger, acknowledges his authority, and holds himself at his disposal and in his custody, no ceremony is necessary, and none is ever used. The debtor is nevertheless completely imprisoned; and it is the almost only way in which debtors ever are imprisoned.

But if this be usual, and sufficient apprehension, and imprisonment in relation to the creditor who uses the caption, it must also be sufficient apprehension and imprisonment in relation to other creditors, who are proving bankruptcy. For creditors, who wish to prove a bankruptcy, must take for that purpose such imprisonment of the debtor, as other creditors who did not mean to constitute bankruptcy have been satisfied with; and if such imprisonment as satisfies a creditor's executing a caption for payment of his debt, be not admitted as a sufficient constituent of bankruptcy, the act 1696 must be defeated.

For this reason, in the *first* place, it was necessary to hold, that custody by the messenger, without actual putting into jail, was imprisonment in the sense of the act 1696; for it frequently happened that creditors, executing captions for payment of debt, were satisfied with this species of imprisonment. Accordingly this was decided by the House of Lords, in the case of Woodston, not on any views of English law, but on a full consideration of the statute and the law of Scotland. This was declared from the Bench, by the Lord President, Dundas, in the case of Fraser

against Munro, 5th July 1774; in which the judgment of the Court accordingly was: "The Court was clear to adhere to the direction of the "House of Peers, in the case of Woodston, as establishing a rule that "ought to be permanent and not arbitrary." And it has since been admitted as a fixed point.

For the same reason *a fortiori* it is necessary to hold, that imprisonment or custody by the messenger is sufficient in questions of bankruptcy, though the solemnities of blazon, &c. be not used, if it be such imprisonment or custody as satisfies a creditor using the caption to recover payment. Accordingly, neither in the case of Woodston, nor in any of the cases that followed, was there any thing said at all about these solemnities. No inquiry was made whether they had been used or not, though in all probability, indeed almost certainly, they had not.

Here there can be no doubt, that *de facto* Lambert was in custody of the messenger. The messenger came to him with a caption; and both he and the messenger understood he was made a prisoner. Accordingly he was carried to Glasgow, and kept there till liberated by an express authority from the creditors who used the caption.

As to the instructions, they of necessity implied that the messenger was to take Lambert into custody, unless he received from him payment or security. The delivery of the caption to him was sufficient instruction to do that, and it was done accordingly.

There was considerable division of opinion on the Bench.

The majority of Judges adopted the arguments of the defender, and repeated the opinions that had been expressed in the case of Ewing against Jamieson. It was also observed, that if messengers and men of business formed negligent and erroneous ideas as to the forms of legal proceedings, that could not change the law, nor required any statute to correct it, the natural and best corrective being the decisions of the Supreme Court. That the case of Woodston had decided that imprisonment might be constituted without putting into a public jail and by the custody of the messenger only, yet it must still be a plain unambiguous custody. That it was quite impossible to suppose that the creditor or a messenger should have it in his power to stop the currency of trade by a private act which gave no indication whatever of bankruptcy to the public, and which he might conceal and explain away if he pleased.

That, in this case, the messenger had acted not in that capacity, but in his joint character of *agent*. That accordingly he had not carried the debtor to the nearest jail (Kilmarnock) in terms of the caption but to Glasgow.

On the other side, it was observed that the effect arising from the decision in the case of Woodston would be greatly increased, if not only the plain test of actual incarceration was to be given up, but nice inquiries to be made into the legality of custody. That Lambert was *de facto* in custody, and would have gone to jail if the creditors had not liberated him.

The judgment of the Court was, "alter the interlocutor reclaimed a-"gainst; and assoilzie the petitioners from the whole conclusions of the "libel."

Against

Against this judgment the pursuer relcaimed, but this reclaiming petition was refused without answers.

Lord Ordinary, *Cullen.* Act. *David Cathcart.* Alt. *George Jos. Bell.*
Ro. Young and *J. Thorburn*, Agents. *M.* Clerk.

M.

No. LVI. *June* 21. 1808.

ALEXANDER WELSH MAXWELL

AGAINST

JEAN WELSH MAXWELL.

PRESCRIPTION.—*Successive heirs in whom co-existed the character both of heir of line and institute, and heir of entail, having possessed for more than* 40 *years, without making up a feudal title in any of these characters,—the entail was not extinguished by the negative prescription.*

BY a deed of entail dated 16th September 1742, Alexander Welsh "Alienated and disponed the lands of Skarr, &c. from him, his "heirs, and successors, in favour of William Welsh his nephew, son to "the deceased John Welsh in Roughmerkland, his brother-german, and "the heirs-male lawfully to be procreated of his body, whom failing, to "William Welsh chirurgeon in London, and the heirs-male lawfully to "be procreated of his body; whom failing, to Robert Hamilton, son "lawfully procreated between the deceased Robert Hamilton of Mac-"whirn, and Elizabeth Welsh, his (the entailer's) third lawful sister, and "the heirs-male lawfully to be procreate of his body;" and after them to a long series of heirs. By the deed of entail it was further "Provided "and declared, that the said William Welsh my nephew (the institute) "and the heirs-male of his body succeeding to the said lands and estate, "shall be bound and obliged, as, by acceptation hereof, they bind and ob-"lige themselves to make payment of all my just and lawful debts, and "expences of my funeral," &c. But there was no clause obliging the institute to complete titles under it within a specified time. On the 6th November 1742, the deed was recorded in the register of tailzies *.

In

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* The entailer executed a testament of equal date with the entail, bequeathing to the institute his moveable estate, and charging him with certain legacies. It was asserted, but disputed, that the institute had acted under this testament, and homologated the entail. It is unnecessary, however, to notice this argument, because it did not enter into the deliberations, or in any degree influence the judgment of the Court.

In the year 1748, Alexander Welsh died, and was succeeded by his nephew William Welsh a pupil. William Welsh having a personal right to the lands as institute, or disponee, under the deed of entail, and being also apparent heir under the preceding investiture, continued to possess till the year 1762, when certain steps, by means of a trust-adjudication, were taken with the view of vesting in him a feudal right, and perhaps of defeating the entail. Certain debts due by the entailer were acquired in the name of John Coltart, the trustee, for this purpose. A decree of constitution, and afterwards (24th November 1773) a decree of adjudication were pronounced in his favour.

Before having obtained a reconveyance from Mr Coltart, or having expede any titles under the adjudication, William Welsh died. William Welsh was succeeded by his son John Welsh Maxwell. The decree of adjudication and grounds of debt were (19th June 1786) conveyed by Coltart to David Newall writer in Dumfries in trust; and were (21st January 1788) transferred by Newal to John Welsh Maxwell himself. On this title by adjudication John Welsh Maxwell (3d January 1789) expede a Crown charter, and (10th December 1793) was infeft thereon.

On the 16th December 1800, John Welsh Maxwell died, and was succeeded by his brother William, who survived a short time.

Till this period, the successive possessors of the estate had united in their persons the title under the entail, and that of apparent heir of line of the entailer, to which the feudal title under the charter of adjudication was added at a late period.

After the death of the last William, the character of heir under the entail, and that of heir of line of the entailer, separated and devolved on different persons. A competition ensued between Mrs Jean Welsh, wife of Lieutenant-Colonel Newal, the sister of the last William Welsh and the heir of line of the entailer, and Alexander the son of Robert Hamilton of Macwhirn, the second special substitute of the entail.

Alexander Hamilton expede a general service as heir of tailzie and provision to William Welsh the institute; thus acquiring right to the unexecuted procuratory in the deed of entail, and obtained a Crown charter of resignation, on which he was infeft. Having invested himself with this title, he raised a reduction of the decrees of constitution and adjudication, and the titles following thereon; and as Mrs Jean Welsh, in virtue of these titles, claimed right to the estate, a process of multiplepoinding in name of the tenants was raised, and conjoined with the reduction.

The defenders maintained, *1st*, That the entail founded on was cut off by the negative prescription; and, *2dly*, That even were this not the case, she was entitled to retain possession of the estate till the debts contained in the adjudication were paid.

The Lord Ordinary, (Armadale,) pronounced the following interlocutor (15th January 1805): "Sustains the defences of the negative prescription pleaded by the defender Mrs Jean Welsh Maxwell, as heir of line of Alexander Welsh her grand-uncle, against the personal deed of tailzie executed by the said Alexander Welsh in 1742."

The

The case then came before the Inner-House by petition and answers.

Argument for Mrs Jean Welsh Maxwell.

By the statute 1469, c. 28. introducing the negative prescription, renewed and explained by statute 1474, c. 54. and by that part of the statute 1617, c. 12. which relates to the negative prescription, it is enacted, that " The party to whom the obligation is made that has interest " therein, shall follow the said obligation within the space of 40 years, " and take documents thereon, and gif he does not, it shall be prescribed " and be of none avail; the said 40 years being running and unpursued " by the party."

To determine whether the entail has been cut off by the lapse of negative prescription, the first enquiry is to ascertain to which of the titles, existing in the person of the heirs, possession is to be ascribed, whether to their title as heir of line, or to that under the entail. On this point the rule of law is fixed, that where two unlimited titles co-exist in the person of the possessor in apparency, the possession is to be attributed to both, and prescription cannot be pleaded on the one against the other. But if one of the titles be limited, and the other unlimited, if by one of the titles the property may be taken up in fee-simple, and by the other, under a strict entail, the possession, by presumption of law, is to be ascribed to the unlimited and more favourable title. This principle of law is stated in the introductory remarks of Lord Kilkerran to the case of Bogle and Smith against Gray, and is unquestionably sound, Kilk. p. 424. In this case, as well as in that of Durham against Durham, (24th November 1802,) it was found that where two unlimited titles co-exist in the person of the heir, and where infeftment has been taken on one of them, yet, as apparency is a good title of possession, the positive prescription does not establish the one, nor does the negative prescription cut down the other, but the heir is held to have possessed on both.

If, however, the case had been that of the two titles, one had been a limited title, and the other an unlimited one, and that infeftment had followed on the latter, there can be no doubt but that the unlimited title would have been established, to the exclusion of the other, by the positive prescription, because of the two titles, the law presumes that the possession was held on the most favourable, Kilk. p. 416. M'Dougal, with the concluding observations thereon. On the same principle, possession must in the present case be ascribed to the unlimited title of heir of line; and the entail having been latent, and no document having been taken on it by the heirs, in whom it created a *jus crediti*, it has perished by the operation of the negative prescription.

That the heirs had a *jus crediti* under the entail, that they were *valentes agere* to the effect of compelling the heir to make up titles under the entail, and that therefore there were *termini habiles* for the currency of the negative prescription, is equally clear. Till infeftment was taken on the entail, the substitutes were not safe; and although the entail contained no special obligation to make up titles under it, and the heir had done nothing in contravention so as to sanction an irritancy by which the succession would be brought nearer to the substitutes, yet either under

the act 1685, or at common law, an action would have been competent to place the estate under the protection of the entail. Thus an action to compel the heir to register the entail, although it contained no obligation to that effect, would have been competent. The possessor could not have effectually answered that he possessed on the personal right under the entail, because he is contradicted by the legal presumption, and because he is bound to secure the estate in terms of the settlement.

But in questions of negative prescription, the conduct of the creditor, and not that of the debtor, in the right, must be the rule. If, having a proper *jus crediti*, the creditor has not taken document thereon for 40 years, the right perishes by the negative prescription, whether the debtor has counteracted the obligation or not. But if the debtor has contravened the obligation, and the creditor acquiesces in it, the debtor secures himself by the positive prescription. These, however, are distinct matters; the one being a *modus amittendi dominii*, the other a *modus acquirendi dominii*, which have a distinct and independent operation. Nay, the argument is strengthened and illustrated by the terms of the statute itself; for it appears from these terms, that if rights of reversion, the strongest with which a disposition can be qualified, had not been excepted, they would have perished by the negative prescription.

The case 6th December 1771, Porterfield, bears a strong analogy to the present. In that case the negative prescription cut down an obligation to grant a destination, although during its currency the creditor could have derived no advantage from insisting for implement, but that of having the estate secured in terms of the personal obligation, and although the obligation only imported a simple and defeasible destination. That every action founded on the entail is competent to the remoter heir against those in possession, does not admit of controversy, Ersk. b. iii. tit. 7. § 37. See likewise 10th July 1739, M'Dougal, *Home* and *Kilk.* p. 416. From these authorities, it is clear that the heirs have an unquestionable title and interest to compel the possessor to complete his title under the entail. In the case, 1st March 1782, Dalhousie against Maule, it was the unanimous opinion of the Court, that "A substitute heir of entail has a *jus crediti* to entitle him, and has "an interest to oblige the heir in possession to expede charter and sasine "upon the entail, and to possess under these."

It is by no means indispensible to the operation of the negative prescription, that there should be a simultaneous and correspondent operation of the positive prescription. Cases, no doubt, occur in which rights are created and transferred by their combined operation. But if a right could not be lost by the expiry of the negative prescription, unless the party pleading could shew that he had gained it by the positive prescription, the former would be redundant and unnecessary. Negative prescription, however, has an independent operation, and is one of the modes *amittendi dominii*, which, without directly creating a right in the person by whom it is pleaded, extinguishes that of his adversary. It is only necessary for the person, by whom it is pleaded, to shew that, on the extinction of his adversary's right, a right will emerge to himself. In the present case, on the extinction of the entail, a complete right arises to the defender, both as heir of line of the entailer, and on the titles obtained

tained on the decree of adjudication. These principles were recognized by the Court in the opinion delivered in the case, 1st March 1782, Dalhousie against Maule; likewise in the following cases, M'Dougal, *supra*; 31st July 1756, Ayton against Monypenny;—9th December 1762, Duke of Hamilton against Douglas.

If the negative prescription has any application to this case, it must cut down the destination as well as the fetters of the entail. They are inseparable parts of the same deed; and the peculiar destination is in fact and in law one of the most important and distressing fetters. There is no solid ground for authorising a distinction between these two objects of the deed. But to make way for the operation of the negative prescription in any degree, it is necessary to ascribe the possession of the successive heirs to their title as heir of line, and not to their personal right under the entail; and if this point be conceded, the entail must of necessity have perished *in toto*.

Argument for Alexander Welsh.

The deed of entail does not contain any obligation to make up titles under it within a specified time; and it is admitted that nothing has been done by any of the heirs in contravention of its terms, on which a legal challenge could have been brought by the substitutes. By the conditions of the entail, there was undoubtedly created a *jus crediti* in favour of the heirs called under it; but while this obligation was not violated by the heir in possession, and while nothing is done by him to call for the interference of the substitutes to enable them to "follow the obligation," or to bring an action to implement or enforce the obligation, it is obvious that the heirs were *non valentes agere cum effectu*.

To render the heirs *valentes agere*, it is certainly not necessary that instant patrimonial advantage should arise from the action; for where the conditions of the entail have been contravened, an action is competent to the most remote substitutes. The rule of law in this and every analogous case, is precise, that wherever an obligation, which may be followed and enforced by an action at law, and on which document must be taken for its security, such obligation will be extinguished by the negative prescription, as to all parties to whom it was competent, but who have neglected within the proper period to bring the action, however remote their benefit may have been. On this principle was decided the case of Porterfield, 6th December 1771, where an *obligation* to execute an entail perished by the negative prescription.

In the present case, as nothing had been done in contravention of the entail, which it could be the object of the action to vindicate, the only purpose or interest which the heirs could have to insist, would be to interrupt the currency of prescription. But it is an established doctrine in the law, that prescription cannot run against the creditor in an obligation, when all that the creditor could do for the purpose of interrupting its course would amount to a mere declaration of his own opinion of his right, without the possibility of compelling the obligant to do any thing towards implement of the obligation. In a word, it is not necessary for the

the creditor to bring an action against the obligant for the single purpose of interrupting prescription, and when no other purpose is to be accomplished.—Ersk. b. iii. tit. 7. § 37.—Dict. vol. ii. p. 124.—*Harc.* 22d Nov. 1687, Somerville.—*Fount.* 31st Dec. 1695, Innes. 13th June, 1761, Belhaven. 1st March 1782, Dalhousie *against* Maule.

But although the fetters of the entail might be worked off by the course of the negative prescription, it by no means follows that the destination should also perish. As the destination has never been altered, it must remain in full force as the regulating law of the descent of the estate, while the conditions and provisions by which the destination is protected, being an *obligation* on the heir not to alter, may have been extinguished. The negative prescription has an exclusive reference to cases where there is a *jus crediti et debiti*,—where there is an obligation which may be the foundation of an action against the obligant. It is not therefore, like the positive, a mode of acquiring property, but a mode of extinguishing obligations, or removing incumbrances.

The obligations to which negative prescription applies may relate either to heritable or personal subjects; accordingly, the act 1617, c. 12. did not introduce prescription with respect to heritable subjects, but limited its operation with respect to heritable bonds and reversions. At the date of this statute, the modern entail, with the clauses to secure the permanency of the destination, was unknown; but when entails were introduced, the limitations were considered, by an obvious analogy, as creating a *jus crediti*, or obligation against the heir in possession, in favour of the remoter substitutes. Regarding the fetters of the entail in this view, it follows that, like other obligations, they might be extinguished by the negative prescription; but that the destination, with which these clauses were incidentally and subordinately connected, could lose its force by the mere lapse of time, or that there could be a negative prescription of infeftments themselves, or of the conveyances of the property of real estates, is not sanctioned by any of the statutes, and would be a virtual repeal of those clauses in them introducing the positive prescription, by which it is provided, that heritable property can only be acquired by possession on a proper feudal title for 40 years.

Following out these principles, it may be further maintained, that the negative prescription cannot be pleaded against a real right of property, and cannot be the foundation of a real right without the concurrent operation of the positive prescription. Negative prescription applies only to obligations or incumbrances; and the person who propones it is, *ex hypothesi*, in the real right of the subject to which these obligations attach. Such is the doctrine delivered by the Court in the case of the Earl of Dalhousie and Maule. See likewise *Edgar*, 20th July 1725. Paton,—24th Dec. 1728, Presbytery of Perth. Erskine, b. iii. tit. 7. § 8.

That the possession of the successive apparent heirs must be ascribed to their title as heirs of line, and not to that as heirs of entail, is not warranted either by the circumstances of the case or by the cases quoted in support of that doctrine. The entail was the paramount and regulating investiture of the estate. It was indefeasible by any operation of the heir in possession; and it was the title under which he was bound in justice,

justice, and compellable in law (if he had attempted to contravene) to possess. It was the title under which it was his duty, and must therefore be his presumed intention, to have possessed.

A majority of the Court differed in opinion with the Lord Ordinary. They considered that the entail was the *lex feudi*, the only title under which it was lawful, and under which it must therefore have been the presumed intention of the heirs to possess. Their possession must, of course, be ascribed to their right under the entail. No act had been committed in contravention of its terms, which could authorise the legal interposition of the heirs,—no change even of the destination had been attempted,—and there was no obligation to make up feudal titles under the entail within a specified time. The only object of an action at the instance of the heirs would have been, to have it formally declared that prescription was not running,—a proceeding which the law did not require.

The Lords (22d Jan. 1807) altered the interlocutor of the Lord Ordinary, and repelled the defence; and (21st June 1808) on advising a reclaiming petition and answers, *adhered*.

Lord Ordinary, *Armadale*. Act. *Tho. Thomson*. Alt. *Dav. Monypenny*.
Agents, *J. Cawin & Alex. Blair*, W. S. Scott, *Clerk*.

J. W.

No. LVII. *June* 21. 1808.

WILLIAM WALLACE

AGAINST

JOHN OSBURN BROWN, W. S. Trustee for the Creditors of ROBERT SMITH Builder in Edinburgh.

PERSONAL OR REAL.—*Of two conterminous proprietors, one built a mutual gable, and the other became bankrupt without paying for his proportion of it. The former was found to have a preferable claim to the expence of the gable upon the price of the property adjoining, and forming a part of the bankrupt's estate.*

WHEN that part of the New Town of Edinburgh, consisting of Heriot-Row, and lying to the north of Queen Street, was projected, a plan was adopted, which contained the elevation of each house, and obliged the builders to have mutual chimney tops and gables.

When the execution of this plan was begun, the trustees of Heriot's Hospital, the superiors of the ground, had been in the practice, where one area was feued out, to pay the half of the mutual gable when the house was finished. This was done with the view of having the street finished with the more expedition; and the Hospital had an opportunity of being indemnified when the next area was feued out.

The Hospital altered this arrangement; and exposed certain lots with the following condition:—"1*st*, That the purchasers of the several lots "shall be bound and obliged to carry up the respective buildings to the "level of the street, and to complete the cellars and side pavement, be- "tween and the term of Candlemas 1804, and to have their houses "completely roofed in between and the term of Martinmas 1804, and "that under the liquidate penalty of L.100, to be paid to the treasurer "of the said Hospital by the purchaser of each lot, over and above "performance. 2*d*, That the exposers are not to be at any expence "for building mutual gables, but the purchasers shall have their recourse "for the half of any mutual gables, upon the persons purchasing the ad- "joining area, who shall be bound to pay the same when the said con- "tiguous purchaser begins to build, with interest thereafter."

Two conterminous areas were purchased; the one on the east by Robert Smith, the bankrupt,—the other, on the west, by William Wallace, the pursuer. Smith was not infeft.

On his area the pursuer built a dwelling-house, of which the gable and garden-wall were mutual with his neighbour Smith; and Smith became bankrupt, without either paying the proportion of this mutual wall due by him, or building a house on his area.

Mr Osburn Brown, having been appointed trustee on the sequestrated estate, exposed the subject to sale, under a declaration, that "half of the "mutual gable on the west is to belong to the purchaser;"—the defender thus taking on himself the question respecting the expence of the mutual gable. The pursuer became the purchaser. The trustee refused to prefer the pursuer for the half of the mutual wall; upon which he raised an action for the price; and the cause having been debated before Lord Craig, Ordinary, the following interlocutor was pronounced, (11th Dec. 1806)—"On hearing parties, find that although there is a debt "due to the pursuer for the erection of the gable in question, yet he has "no preference on the subjects in question therefor."

The Court differed in opinion from the Lord Ordinary. By the plan prescribed to the feuar, any person building a house in this situation must erect a mutual gable. This proceeds not on any contract with the conterminous heritor, but from the necessity of his situation. The ground on which the mutual gable stands is common, mutual, and indivisible; and therefore there is no room for the maxim, *inaedificatum cedit solo*. The gable, in fact, was the property of Wallace the builder, till paid for; and till then he had a right to prevent Smith, or his trustee, from using it, or adjecting to it any building.

The Court altered the interlocutor of the Lord Ordinary; and found the pursuer entitled to retain the price or cost of erecting one half of the gable

gable in question; and, on advising a reclaiming petition, and answers, adhered, 21st June 1808.

Lord Ordinary, *Craig*. Act. *Geo. Jos. Bell*. Alt. *D. Douglas* et *J. Harrowar*. *Rich. Cleghorn & J. Os. Brown*, Agents. *F.* Clerk.

J. W.

No. LVIII. *June* 22. 1808.

WILLIAM MARTIN,

AGAINST

JANET PATERSON.

PERSONAL OR REAL.—*Circumstances in which a reservation in a disposition entering the sasine, and making part of the investiture, did not constitute a real burden on the lands.*

ON the 23d day of August 1785, Joseph Mundell conveyed his moveable funds to Messrs Gordon and Goldie as trustees. He likewise executed a disposition of his landed property in favour of his nephew, William Johnston, and his heirs, under burden of the sum of L. 800, payable to his trustees, to be applied in terms of the trust. After a narrative of love and favour, the disposition proceeds, "Likeas I, "by these presents, with and under the reservations, burdens, provi- "sions, and conditions under-written, give, grant, alienate, and dispone "from me, and all others my heirs and successors, after my decease, to "and in favours of the said William Johnston, his heirs, executors, and "disponees whatsoever, absolutely and irredeemably, without any man- "ner of reversion, redemption, and regress, All and Whole, &c. In "which lands and others above disponed, I hereby bind and oblige me, "my heirs and successors, duly and validly to infeft and seise the said "William Johnston and his foresaids, with and under the burdens, pro- "visions, and conditions after expressed."

The first of these burdens and conditions is thus expressed, "Provid- "ing always, as it is hereby expressly provided and declared, that the "said William Johnston and his foresaids, by their acceptation, shall be "bound and obliged to make payment to Thomas Goldie of Craigmuie, "commissary of Dumfries, and John Gordon farmer at Newbridge, "trustees named and appointed by me, of the sum of L. 800 Sterling, "to be by them applied in terms of a trust-right and conveyance exe- "cuted by me in their favour, of even date with these presents, and "that against the term of Whitsunday or Martinmas that shall be one

"full

" full year after my decease, with interest thereof from the first term of " Whitsunday or Martinmas immediately subsequent to my decease, un- " til payment, and a fifth part more of penalty in case of not due and " punctual payment, as also to make payment to the persons after nam- " ed of the yearly annuities under written, viz." &c.

After enumerating these annuities, it is provided and declared, *2do*, " That these presents are granted by me, with the further burden of the " payment of the sum of L. 200 Sterling to each of the children law- " fully procreated of the body of the said William Johnston, surviving " him." And it is further declared, " That the subjects above disponed " are in full of all heirship, executry, or any other thing which the said " William Johnston or his heirs can anyways ask by and through my " decease, excepting so far as is provided in their favour by my said " trust-right and conveyance, under which burdens, provisions, and con- " ditions these presents are granted by me, and to be accepted of by the " said William Johnston and his foresaids, and no otherwise."

The precept of sasine ordains sasine to be given to the disponee in the lands, " but always with and under the burdens, provisions, and con- " ditions before specified, which are hereby appointed to be engrossed " in the infeftments to follow hereupon."

On this precept infeftment accordingly followed in the person of William Johnston, the disponee. In the sasine, the disposition and precept, in the terms and under the burdens above mentioned, are at large engrossed. " And Thomas Kerr in Daltonhook, as bailie in that part afore- " said, by virtue thereof, and of the office of bailiary thereby commit- " ted to him, gave and delivered heritable state and sasine, actual, real, " and corporal possession, of all and whole the said three-pound land of " old extent of Bengairhill and Bengair, &c. but with and under the " servitude and privilege in favour of the purchaser of Upper Dormont, " and the other burdens, provisions, and conditions before specified, to " the said William Johnston, by delivering to him of earth and stone of " the ground of the said lands, with all other necessary and usual sym- " bols."

Certain partial payments of the sums with which the disposition was burdened were made by Mr Johnston; but at his death there remained a balance of L 240 Sterling, besides interest.

Previous to his death, Mr Johnston executed two deeds, by one of which he granted to his widow, Mrs Paterson, a liferent over a certain part of the lands, in which she was infeft *propriis manibus*; by the other, he conveyed his whole property to his eldest son, under the burden of certain provisions to his children, which were declared to be real liens on his lands.

In the mean time, the pursuer, Martin, paid up the balance due to Mundell's trustees, and acquired right to the debt and security held by them. Having constituted the debt against Joseph Johnston, the eldest son and heir of William, he then led an adjudication, and brought an action of maills and duties against Johnston, his tenants, and Mrs Janet Paterson the widow, insisting, that the sums contained in Mundell's disposition to William Johnston were real and preferable burdens. The Lord Ordinary (Craig) decerned in terms of the libel.

The

The cause then came before the Court by petition and answers.

Argument of the defender.

To realise a lien on lands, it is necessary that the burdens be directed against the lands themselves, and not merely be imposed on the disponee. Unless this be done, the appearance of such a debt in the investitures is insufficient. See Bankton, lib. i. p. 653,—19th July 1780, Allan, *Fac. Coll.*

In numerous cases similar to the present, the mere specification of the burden has been found insufficient. Dict. vol. iv. p. 64.—18th May 1792, Steuart against Hoome, *Fac. Coll.*

In the present instance, although the burden is specified, and declared to be a condition of the disposition, yet it is no where declared to be a *real lien* on the lands.

Argument of the pursuer.

If the obligation was laid on Johnston and his heirs alone, it is not real or effectual against his onerous or rational deeds. If it is directed against the lands, and rendered obligatory against onerous singular successors by entering regularly into the investiture, the pursuer must be preferred. That the burden was meant to be real, is clear from the whole tenor of the deed.

In the dispositive clause, the lands themselves are disponed *under the burdens, reservations, &c.* which necessarily infer a real burden. The obligation to infeft is qualified by a reference to these burdens. In a subsequent part of the deed it is declared, that *these presents are granted with the further burden.* There afterwards follows a clause wherein it is declared, that *under these burdens, provisions, &c. these presents are granted by me, and to be accepted by the said William Johnston, and no otherwise.* This is the very form of expression pointed out by Erskine, lib. II. tit. 3. § 49. to denote a real burden.

The law does not require any specific *formula* of words, or any *voces signatæ*, to constitute a real burden. It is sufficient that there be an explicit declaration of the disponer's will, that it shall be real, and that intimation be made to the lieges by insertion in the investiture. All this has been accomplished in the present instance, in the manner pointed out by Lord Bankton as sufficient for the purpose, in the very passage which the defenders have quoted in their support.

A majority of the Court differed in opinion from the Lord Ordinary; and observed, that, without requiring any technical form of expression for the constitution of a real lien, it is necessary that the intention to impose a burden on land by reservation should be expressed in the most explicit, precise, and perspicuous manner. In a clause by which onerous singular successors are to be affected, there must be no room for ambiguity; but the present instance admits of a doubt; and, therefore, the obligation in favour of Mundell's trustees ought not to be held as constituting a real burden in competition with Mrs Johnston's infeftment.

The following interlocutor was pronounced, (4th March 1808,) "The "Lords having advised this petition, with the answers thereto, alter the "interlocutor reclaimed against; prefer the petitioner upon her infeft-"ment produced, to the rents in question in the hands of the tenants, "and decern; but find no expences due; and supersede extract till the "first sederunt day of May next."

On advising a reclaiming petition and answers, the Lords adhered, (22d June 1808.)

Lord Ordinary, *Craig*. Act. *Geo. Cranstoun*. Alt. *Rob. Corbet*.
A. & W. Douglas, W. S. and *H. J. Wylie*, Agents. *P.* Clerk.

J. W.

No. LIX. *June* 23. 1808.

MAJOR JAMES MOODIE of Milsetter,

AGAINST

ROBERT RUSSELL and OTHERS.

SERVICE AND CONFIRMATION.—*An heir of entail having succeeded as next of kin to a creditor upon the entailed estate, the debts do not vest in him without confirmation.*

IN the year 1760, Mr William Budge, writer to the signet, succeeded to the estate of Toftington in the county of Caithness, under an entail executed in 1751, by his cousin James Budge the former proprietor. By the deed of entail, William was left at liberty to burden the estate with such debts as he chose to contract.

In 1763, William Budge died, leaving two daughters, Janet and Grizel Budge, and a widow, Mrs Catharine Sinclair.

Janet, the eldest daughter, succeeded to the entailed estate, which she possessed on her apparency, and died. Grizel the second daughter then made up titles to the estate, which she possessed till the year 1798, when she died; and the estate devolved on the next heir of entail, with whom she was altogether unconnected.

Mrs Catharine Sinclair acquired an assignation to certain personal debts which had been contracted by William Budge, and were effectual against the entailed estate. She died in the year 1789. Upon the death of Mrs Catharine Sinclair, Grizel Budge, then her only nearest in kin, intromitted with her effects, took possession *via facti* of any moveables belonging to her, paid her funeral expences, for she had no debts, and was decerned her executor *qua* nearest in kin.

Upon the death of Grizel, a competition ensued before the commissaries of Edinburgh, between Major James Moodie the nearest in kin of Mrs Catharine Sinclair, on the one hand, and Robert Russell and others, the nearest in kin of Miss Grizel Budge, on the other hand, with respect to

to the debts to which Mrs Catharine Sinclair had acquired right. Moodie maintained that these debts were still *in bonis* of Mrs Catharine Sinclair, never having been taken up by confirmation; and Russell maintained, 1*st*, That these had vested in Grizel Budge without confirmation: and, 2*dly*, That they had been acquired by Mrs Catharine Sinclair in trust for her daughters; but no proof having been offered or adduced on this last point, the parties pleaded, and the Court decided, on the supposition that these debts were acquired with the proper money of Mrs Catharine Sinclair, and formed a part of her moveable estate.

The commissaries pronounced the following interlocutor; "Find that "on her (Catharine Sinclair's) death, in the year 1789, the said debts "were descendible, and did descend to Grizel Budge her only surviving "child, who was accordingly, in the year 1790, decerned executrix-"dative *qua* nearest in kin to her mother; and on that title, without con-"firming, had an universal intromission with the whole moveable effects "and writings, and estate of Catharine Sinclair, paid all debts owing by "her, and was in particular possessed of the whole bonds, and the other "vouchers of the debts in dispute, which she retained under her own "power till her death in the year 1798; therefore, as Grizel Budge, by "her succession, became both the creditor entitled to receive, and the "debtor bound to make payment of the debts, as she could not pay to "herself by that fictitious as well as nugatory act, to vest either the mo-"ney itself, or the right to it, in her own person, more completely than "they were by her simple existence in the situation described by both "creditor and debtor, to herself, as she was legally authorised to pay even "to the stranger without confirmation: Find that those debts, and the right "to them, were fully and substantially established in her person; and on "her death did not devolve to the mover Henrietta Sinclair, nearest in kin "to Catharine Sinclair, but that they descend to, and are confirmable "only by, the petitioner Jean Calder, nearest in kin, decerned in that "character executrix-dative of Grizel Budge, and already confirmed to "her in part; ordain them to be struck out of the inventory of the tes-"tament of Catharine Sinclair, and allow them to be eiked to the inven-"tory of the testament of Grizel Budge, to whom they did rightfully "belong."

Major Moodie presented a bill of advocation. The Lord Ordinary reported the case on informations. On that report the Court "repelled "the reasons of advocation, and remitted the cause to the commissaries "*simpliciter*."

Major Moodie reclaimed, and his petition was answered.

Argument for advocator.

In moveables confirmation as an *additio hereditatis* is as necessary as service or infeftment in heritable rights, (Ersk. b. iii. tit. 9. § 30.) Since the penalties of vitious intromission have been abolished, and since succession has become a source of revenue to the state, it is necessary to adhere to this general rule, that a faithful distribution of the effects of the deceased, and an accurate account of their amount may be secured.

To this general rule there are just four exceptions wherein effects transmit without confirmation, 1 B. 1690, ch. 26; in the case of special assignations,

signations, and special legacies; *2dly*, In the case of the *legitim* and *jus relictæ*; *3dly*, The confirmation of one subject transmits the whole succession; *4thly*, In the case of such moveables as are capable of being possessed *via facti*, wherein the possession of the *ipsa corpora* is sufficient to vest them. But the case of Miss Grizel Budge is not within any of these exceptions.

That a decree-dative in favour of the nearest of kin, without confirmation, is not a sufficient title to convey, has already been decided (13th February 1760, Susannah Ogilvie against his Majesty's Advocate) and from this it necessarily follows, that the *jus sanguinis*, accompanied with the intention to represent, is not sufficient without an *additio hereditatis*. If this had not been the law, a *decreet* dative, being unequivocal evidence of intention, ought to have been as effectual as a confirmation.

So likewise it is determined, that while possession *via facti* of the *ipsa corpora*, of such moveables as admit of it, vests those which are actually apprehended, yet no *general title* to the other moveable subjects is thereby created. (Dict. vol. iv. *voce* Service and Confirmation, p. 269.)

By analogy from the case of simple moveables, payment by a debtor to the unconfirmed nearest of kin of the creditor may be safely and effectually made, and what is so paid transmits. So likewise a debtor, by granting a bond of corroboration to the nearest in kin, whom he thus substitutes in place of his deceased creditor, renders confirmation unnecessary.

But in all these cases possession and apprehension (or what is held in law as equivalent) of one moveable, creates no right to demand possession of another. It gives a right to retain, not to acquire; it constitutes a defensive, not an active title.

It is admitted by both parties that the debt was not actually paid; and there is no plea of implied payment, or extinction *confusione*, by the coincidence of debt and credit in the person of Grizel Budge. For it is the interest of both parties to admit and hold, that the entailed estate was and still remains the proper debtor in these bonds. The executors of Grizel are not defending themselves for a claim against her estate, but contending that a *jus agendi*, an active title transmitted to them, while she, in whose person they pleaded, neither acquired it by assignation, nor took that legal step by which alone it could otherwise have been obtained. The very acknowledgement that the debt is still to be recovered from a third party (the entailed estate) and that the struggle is for an active title, shews that Grizel was not placed, in relation to these debts, in any of the predicaments already pointed out as exceptions to the general rule.

If the defenders were desirous to compel payment of the bonds, there is no form by which the preparatory step of registration could be accomplished. By act 1693, ch. 15. that writs may be registered after the death of the creditor, it is necessary that, in the case of heritable rights, a service and retour, and in the case of moveables, a confirmed testament, containing the bond or other writ, or a special assignation, be produced. The only person, therefore, entitled to obtain the bonds in question registered, is the pursuer, the nearest in kin of Catharine Sinclair.

The only case bearing the slightest similarity to the present, is that in which 'An elder brother, intromitting with the effects of the younger on 'his

'his death, was found to have vested in himself a provision with which 'he was burdened,' (7th March 1769, Pringle against Veitch) but that case differs from the present in a very essential point. 1*st*, The elder brother was the only and proper debtor in the bond of which payment was implied and extinction presumed *confusione* by the coincidence of debt and credit in his person, whereas in this case the heir of entail is the proper debtor; and nothing is more distant from the intention of either party than to presume payment or extinction *confusione*. 2*dly*, The person in that case standing in the right of the eldest son, pleaded on a defensive title, that in law payment was held to have been made, and a repetition could not be demanded; whereas, in this case, the defender is contending for an active title, and for a right to pursue a third party.

Argument for defender.—The question is not what legal solemnities are required to constitute a title to pursue, but what acts are sufficient to vest a right in the next of kin of a defunct to the effect of transmission.

The form and necessity of confirmation derived its origin from the usurpation of the church. During the rigour of ecclesiastical tyranny, the moveables of a person dying intestate were seized and disposed of by an executor appointed by the church. This abuse was gradually corrected; the consistorial court succeeded the ecclesiastical power; and the small tax that is yet paid to that court, is the legalized remains of what was originally an intolerable grievance. The progress of the law is marked by various acts of Parliament, (Stair, lib. 3. tit. 8. § 51.) the last of which (1690, ch. 26.) directs that there shall be no confirmation but at the instance of the nearest of kin, their tutors and curators, or of a creditor.

The *jus sanguinis*, therefore, vests the rights to the moveables to the effect of transmission: Accordingly it has been found, that a child's survivancy transmitted its right to its nearest in kin (19th July 1623, Sibbald against Procurator-Fiscal of St Andrews); so likewise (16th February 1614, Hope *de Execut.*) Whether confirmation be in all cases necessary to vest an active title, it is unnecessary to inquire; but that it is not necessary to vest to the effect of transmission, is clear from the undisputable fact, that *partial* confirmation creates in the next of kin a right to all the other unconfirmed moveables to the effect of transmission. The doctrine of partial confirmation establishes that the *jus sanguinis*, united with the intention to represent the defunct, is all that the law requires.

Likewise the possession of the *ipsa corpora* of the moveables, whether by the nearest in kin himself, or by another for his behoof, supersedes the necessity of confirmation (3d February 1744, Brand against Gray, Kilk.)

In the case of *nomina debtorum*, if a debtor to the defunct pay the debt to his nearest in kin, confirmation is unnecessary. (28th July 1784, Buchannan and Auld against Grant.)

So likewise if a debtor without paying renews the security by bond of corroboration (20th February 1751, Creditors of Alcorn, *Kilk.*)

From these decisions it follows, 1*st*, That confirmation is not a sole and indispensible title to a moveable estate. 2*dly*, That confirmation, as applied to a particular subject or debt, is not necessary to enable that debt to transmit.

But by a more recent decision (Pringle against Veitch, 7th March 1769) it has been found, that the subject of a person deceased may be taken out of his effects, without confirmation partial or total, by the mere concurrence of the debtor and creditor in the same person.

The present case is precisely because, 1*st*, Grizel Budge was the sole nearest in kin to her mother, and therefore had the *jus sanguinis*.—2*d*, She clearly shewed her intention of representing her mother, not only by an universal intromission, but by being decerned executrix *qua* nearest in kin.—3*d*, She was representative of her father and uncle, as well as heiress of entail; and in both these characters was liable for the debt. The character of debtor and creditor coincided in her person; and the fund of payment was in her possession as much as could have happened in the analogous case wherein a debtor pays up a debt or grants a bond of corroboration. If she had actually paid the debts, and granted herself a discharge, the debts might not have been extinguished *confusione*, but *ex concessis* they would have vested. But the law cannot require such an idle ceremony as a simulate payment and nominal discharge by the nearest in kin to himself.

And, on advising a second reclaiming petition and answers,

The Court were of opinion, that there was a difference between this case and that of Pringle against Veitch. In that case, the coincidence of debt and credit was equal and unlimited, and the principle of extinction *confusione* had full operation. In this, the proper debtor was the entailed estate, and there was no room for extinction *confusione*.

A general opinion likewise prevailed, that to dispense with the necessity of confirmation, in any farther degree that was sanctioned in that case, would be unsafe and unexpedient.

The Lords adhered (23d June 1808).

Lord Ordinary, *Bannatyne*. Act. *Jo. Clerk & Dav. Douglas*. Alt. *Advocatum*. *H. Moncrieff*, W. S. and *Ja. Horne*, W. S. Agents. *P.* Clerk.

J. W.

The interlocutor of Court (29th January 1804,) was, "Alter the interlocutor reclaimed against; and find that the debts in question "descend to the petitioner (Major Moodie) as executor *qua* nearest in "kin to Mrs Katharine Sinclair; and, therefore, remit to the commissaries to ordain said debts to be struck out of the eik to the inventory of the testament of Grizel Budge, and replaced in the inventory "of the testament of the said Katharine Sinclair; and (23d June 1808,) "the Lords adhered."

No. LX. *June* 23. 1808.

ROBERT BLACKADDER and OTHERS,

AGAINST

JOHN BLACKADDER and OTHERS.

SERVICE AND CONFIRMATION.—PROOF.—*Confirmation necessary to establish a right to the dead's part in the nearest in kin. Parole proof of the date of lodging bond of caution and inventory with the commissary clerk incompetent.*

MARGARET BLACKADDER, wife of John Heriot, died on the 28th July 1786, pre-deceasing her husband, and leaving no issue, settlement, or marriage-contract.

Alexander and James Blackadder, her brothers-german, were her nearest in kin, and had right to one half of the goods in communion.

James died before any measures were taken respecting her succession. Alexander, then her sole and nearest in kin, having raised an edict before the commissary of Lauder, was, on the 20th March 1804, decerned her executor dative.

On the 12th March 1806, Alexander died *in cursu diligentiæ* before the confirmation was expede. On the 3d April, an extract of the confirmed testament was given out by the clerk, bearing date the 1st day of April.

A competition then arose between Robert Blackadder the brother consanguinean and disponee of Alexander, on the one hand, and John Blackadder and others, children of the deceased James, brother of Margaret Blackadder, on the other. Robert offered to prove by parole evidence that an inventory had been made out, and bond of caution executed; all which had been transmitted to the commissary clerk on the 18th February 1806, a period of three weeks before the death of Alexander.

But John referred to two cases of precisely similar circumstances in which this point had been already determined, 23d January 1745, Carmichael against Carmichael, Kilk.; and 13th February 1760, Ogilvie against his Majesty's Advocate.

The Court were of opinion that the proof was incompetent; and pronounced the following interlocutor (June 23. 1808.): "Prefer the chil-" dren of the deceased James Blackadder to the fund *in medio*, and de-" cern accordingly: Find Robert Blackadder liable in payment of the full " expence of extract, but no other expence, and decern."

Lord Ordinary, *Glenlee.* Act. *Baird.* Alt. *John Dickson.*
Agents, *John Craw*, W. S. & *Gibson & Oliphant*, W. S. *Mackenzie*, Clerk.

J. W.

NO.

No. LXI. *June* 24. 1808.

JOHN SHARP

AGAINST

MARGARET HERVEY and OTHERS.

PRESCRIPTION under the act 1695, ch. 5.—BILL of EXCHANGE.—*An acceptor of a bill,* " as security jointly and severally," *has not the benefit of the act* 1695, *ch.* 5.

ON the 3d June 1796, the pursuer drew a bill, which was duly accepted, as follows:

" L. 938. 7*s.* 3*d. Sterling.* *Stirling, June* 3. 1796.

" Against the term of Whitsunday next, pay me, or order, at the " house of James Thomson, jun. Stirling, L.938. 7s. 3d. Sterling, for " value received of (Signed) JOHN SHARPE."——(Addressed) " To " James Thomson, jun. Stirling, as principal, and John Hervey mer- " chant there, as security, jointly and severally. (Signed) JAMES " THOMSON, jun. JOHN HERVEY."

During its currency in the years 1797, 8, 9, 1800, and 1801, various payments were made to account.

Thomson became embarrassed in his affairs; and, on the 17th August 1803, applied for and obtained an act of sequestration. Before the expiry of the ten months allowed by the bankrupt statute to every creditor to produce his grounds of debt and oath of verity thereon, Thomson made an offer of a composition of 12s. per pound, of which himself and Mr Mayne of Powis were to grant bond for 10s. His own bond was to be taken for the remaining 2s. The offer was unanimously accepted by the creditors present, and the bankrupt was discharged. The pursuer, however, was not present at any of the meetings, and had not produced his grounds of debt.

Thomson made payment of L. 60. 15s. but it became necessary to raise an action against Thomson, Mayne, and Harvey, for payment of the balance.

Thomson offered no defence. Mayne objected that his bond of caution made him only liable for a composition, " *on such debts as are or shall be ranked;*" *now the debt pursued for is not ranked, and the document of debt is ex facie prescribed. Before any decreet can go out against the defender (Mayne) the debt must be proved against Thomson.*

Hervey objected, 1*st*, That in respect of the act 1695, ch. 5. he is entitled to be free.—2*d*, That the pursuer did not give in his claim under the sequestration, in consequence of which he has not only been deprived of his dividends, but has allowed the bankrupt to obtain a discharge on a composition of no more than 12s. in the pound.

The decision on Hervey's first defence only is to be noticed.

The

The Lord Justice-Clerk, Ordinary, (22d Feb. 1805) found, "That "the ground of debt pursued on in this case is struck at by the act "1695, respecting the septennial limitations of cautionary objections."

During the dependence of the cause before the Lord Ordinary, the defender Hervey died; and his heirs and trustees sisted themselves.

The case came before the Inner-house by petition and answers.

Argument of the pursuers.

The act 1695, c. 5. applies only to *bonds or contracts for sums of money*, where there is a clause of relief in the bond, or where a separate bond of relief is intimated to the creditor. This statute, being correctory of the former law, has always been subjected to a rigid interpretation, and limited to the precise cases provided for by its enactments.

Thus it has been determined by numerous decisions, that bonds of corroboration and other accessory securities do not come under this act. Dict. vol. ii. p. 116, *voce* Prescrip.—Kilk. No. 15. *voce* Prescription.

So likewise a cautioner in a bond of relief is not entitled to the benefit of the act, (29 July 1762) Ewart against Lothian, Fac. Coll.

Neither is a bond of presentation, nor a bond *ad factum prestandum*, included in it. Dict. vol. ii. p. 115, *voce* Prescription.

Likewise, no cautioner has the benefit of the statute but he who is bound along with the principal in the original bond, and not he who accedes *ex post facto*.—Kaimes Rem. Dec. 3 Dec. 1742.

Thus restricted in its interpretation, the act cannot include a cautionary obligation in a bill of exchange.

1*st*, Because in the year 1695 such a document was almost unknown, and had not obtained any of those privileges which that species of document has, from the subsequent extension of commerce, obtained. By the act 1681, ch. 20. *foreign* bills had, from their importance, been privileged in registration and execution; but it was not till the year 1696, a year after the act now in question was passed, that inland bills were put in the same situation. According to Sir George Mackenzie, (observations on act 1681) these privileges had been withheld, "because, "if that had been allowed, all debts had still been constituted by bills "and not by bonds; and so had been privileged by too summary peti- "tions." Inland bills therefore could not at that time have been a means of borrowing money; and were not in law considered to be either a contract or bond. They were an unprivileged and unimportant document, and could not have been in the contemplation of the legislature when the act was framed.

2*d*, Because a cautionary obligation can only be constituted by a writing accompanied by the solemnities of the act 1681 (21 July 1772. Crichton and Dow against Syme.—25th November 1782, Wallace against Wallace.) In a bill, therefore, which is destitute of these solemnities, a cautionary obligation cannot be contained.

3*d*, Because the nature, uses, and privileges of a bill are altogether inconsistent with the constitution of a cautionary obligation; and the term cautioner, to which alone the act is directed, cannot apply to an acceptor or indorsee. In law, a bill is not a bond or contract, nor is it acknowledged as a mode of borrowing money. "A bill is an open let- "ter, a request, addressed by one person to a second, desiring him to

" pay a sum of money to a third, or to any other to whom that third " shall order it to be paid; or it may be payable to the bearer," (Jacob's Law Dict. *voce* Bill of Exchange.)—By law, a bill is destined and created for mercantile convenience; and for this purpose is invested with extraordinary privileges. All the acceptors and indorsees are jointly and severally liable; and the onerous holder cannot be met with many of those objections which might be pleaded against the original creditor, or any of the successive indorsees. But to permit, in favour of an acceptor, an exception under the act 1695, would be to impede the credit and circulation of bills, and deprive them of that quality which alone can render them useful in mercantile affairs.

In fact, every indorsee is a cautioner, and is entitled to be relieved by the person from whom he received the indorsation, *retro* to the drawer. But it has never been maintained that the act 1695 applied to such a case.

So far as the act 1695 is concerned, it makes no difference whether there is a clause of relief in the bond or contract, or there be a separate bond of relief intimated to the creditor. Now, if, in the present case, the acceptance had been unqualified, and a separate bond of relief had been intimated to the drawer, it is clear that the act of Parliament could not have applied. Such a plea could not have availed against an onerous indorsee; yet, if the act applies at all, it must reach this as well as any other case, and the expiry of seven years must have brought with it a relief from the obligation. The frequent change of the creditor, arising from indorsation, and the privileges granted and required to render a bill indorsable, shew that it is not a *bond or contract* in the sense of the act.

Every creditor likewise (who has not dispensed with it) is entitled to the *beneficium ordinis*. But all the acceptors of a bill are jointly and severally liable; and the word *cautioner* introduced into the bill itself can serve no purpose but to ascertain with more accuracy the ultimate relief of the one acceptor against the other. On these principles the Court have proceeded in deciding several cases.

Thus, it was decided, that where there were three acceptors of a bill, and another person had, by a separate missive, promised that, in *farther security*, the bill should be paid when demanded, the act 1695 did not apply to this separate obligation, (7th Dec. 1784, Howison against Howison.)

So likewise it was found that a cautionary obligation could not be constituted by bill; the term *cautioner* added to the subscription of an acceptor was held *pro non scripto*, and he was found jointly and severally liable. (27th Nov. 1753, Gibson against Campbell.)

Neither is there any room for argument on the ground that a person, who has incurred only the qualified obligation of a cautioner, cannot be subjected to the unqualified obligation of an acceptor. Every person subscribing a bill or any other obligation is presumed to be acquainted with the law by which his obligation is governed.

Argument of the defender.

Bills of exchange, both inland and foreign, had become of national importance, and were known and sustained in law, at a date far previous

ous to the year 1695. Foreign bills had, in the 1681, been clothed with the privileges they at present enjoy; and inland bills were put in the same situation in the year 1696. From this it is obvious, that in practice their importance had been acknowledged, and their utility discovered; and the legislature, in this as in most other cases, merely obeyed the antecedent dictates of public opinion. But there is evidence from the decisions of the Court, that bills had been in use at a much earlier period, (Stair's Dec. 1st Feb. 1669, Brown against Johnston,) Stair, b 2. tit 2. § 7.—Durie, 23d July 1629, Lindsay against Gray. The proper subject of bills is money; and whether they are used as a mode of borrowing money, or transferring it from one place to another, is a circumstance altogether contingent and accidental. In daily practice, the object of a bill is to borrow money; and it was so in the present instance. Of all the modes of borrowing money, that by bill comes the most forcibly within the intention of the act. The formalities attending the execution of a bond afford the cautioner time for reflection; while, in a moment of rashness and facility, a bill, from its simplicity, is the most likely to be subscribed. Whether, therefore, the importance of the document, its object, or its simplicity be considered, there is no reason for concluding that it was not in the view of the legislature. But farther, a bill is a *contract*. By one writer, it is called a contract of *mutuum*; by another, a contract of *mandate*; and by another it is said to partake of the nature of both. To what class it belongs is immaterial; but it is, in this case, a contract containing, *in gremio*, a clause of relief. (Stair, lib. i. tit. 11. § 7.—Bank. lib. i. tit. 13. § 1.—Erak. b. iii. tit. 3. § 25.)

That, in a case where the bill has undergone indorsation, and where the bond of relief is contained in a separate writing, the act 1695 should not apply, is obvious. A bill is not liable to any objections which do not appear *ex facie*. But, on the other hand, a bill is liable to every objection appearing on the document itself. Now, in this case, the qualified acceptance was on the face of the bill; and every indorsee must have seen that it came within the act 1695. Accordingly, a qualification more inconsistent with the nature of a bill, was sustained in a case wherein the exclusion of the *jus mariti*, in a bill taken to a wife, was found to be effectual. (Kilk. No. 17. *voce* Husband and Wife, 11th January 1750.)

If, however, a cautionary obligation cannot be constituted by bill, the document must be null. By the act and consent of the drawer himself the obligation was qualified, and the acceptance would not have been adhibited but upon that condition. To hold *pro non scripto*, so important a condition, and to extend an obligation beyond the intention and without the consent of the person by whom it is to be incurred, is inconsistent with the principles of justice *.

Several

* The following cases may not perhaps be unacceptable, and may throw some light on the subject of this report. They are to be found in a collection of cases in the form of a dictionary, made by the late Lord Elchie, and lately presented to the Advocates Library by Sir James Montgomery, Baronet.

MSS. Elchie's Collection, p. 54, *voce* Bill.—A bill drawn upon, and addressed to a father and son, the father as principal and the son as cautioner, but accepted by both simply, was found null *quoad* the cautioner, 15th Jan. 1736, Gillespie against Barr.

Ibid.

Several of the Judges agreed with the interlocutor of the Lord Ordinary; and expressed their opinion, That what might be the effect of such a qualified acceptance in a question with indorsees, it was unnecessary to inquire. This was a question with the drawer, by whose act and consent the acceptance was qualified and cautionary. The obligation was distinctly that of a cautioner. A bill might be evidence of the contract of *mutuum* as well as a bond or any other writing; and is one of those obligations incurred in an urgent and momentary exigence, which it was the humane intention of the statute to limit to seven years. Where a person has accepted a bill as cautioner, the obligation must either be of that nature, or null; because it is impossible, consistently with justice, to render an obligation more extensive than the parties themselves have stipulated. There is no greater anomaly in such a qualified acceptance, than in an indorsation without recourse, which is frequent in practice.

But a majority of the Judges were of a different opinion; and observed,

A bill is a document of a nature distinct from that of a bond or contract; is introduced for different purposes; and is invested with different privileges. Its province is in law considered to be the transference, not the loan of money. It does not, therefore, come under any of those transactions enumerated in the act 1695, and to which that act was intended to apply.

With the nature of a bill, a cautionary obligation is altogether incompatible; and in a question with the drawer or creditor, there can be no cautioner. A party subscribing incurs a joint and several obligation, and is not entitled to the benefit of discussion. The law, therefore, by which cautionary obligations are governed, totally fails in its application to such a case; neither is any injustice committed against the acceptor, because every one voluntarily subscribing either a bill or any other obligation is presumed to know the legal consequences of the obligation which he has undertaken.

The following interlocutor was pronounced, 24th June 1808.

" The Lords having resumed consideration of this petition, and advised the same, with answers thereto, adhere to the interlocutor reclaimed against, in so far as it repels the defences stated for John Hervey, and decerns; finds the respondent entitled to the full expence of extract, but no other expence, and decern; but remit to the Lord Ordinary to hear parties on the question against whom the decree shall go out, and to do thereanent as his Lordship shall see cause."

Lord Ordinary, *Justice-Clerk.* Act. *John Macfarlane.* Alt. *Ar. Fletcher.* *Jo. Brunton* and *A. Jaffray*, Agents. *M.* Clerk.

J. W.

No.

Ibid. p. 56.—A bill drawn on one as principal, and other two as cautioners conjunctly and severally, being paid by and indorsed to the cautioners, recourse sustained against the successors of the principal, 18th June 1742, John Alexander against Scott.

Ibid. p. 61.—A bill accepted by one as principal, and another as cautioner, being suspended by the cautioner, for that a cautionary obligation could not be created in the form of a bill; the suspender, on oath, acknowledged that he had wrote the bill; that he agreed to become cautioner, and therefore wrote it in that form; that the charger objected to the word cautioner, and that the suspender answered, that he would be bound in no other way. First Lord Kilkerran, and then the whole Court, repelled the reason of suspension; and Drummore, (who was in the chair,) doubted if being bound as cautioner was a nullity, 27th Nov. 1753, James Campbell against David Gibson.

No. LXII. *June* 24. 1808.

JAMES MORISON,

AGAINST

JAMES CONNEL.

USURY—PRESCRIPTION.—*The statute* 31*st Eliz. c.* 5. *introducing a general limitation of penal statutes, applies to Scotland in questions under the* 12*th Queen Anne, c.* 11. § 16. *respecting usury.*

JAMES MORISON merchant in Leith possessed three bills, dated 28th March 1801, drawn by himself upon and accepted by John Stein of Canonmills, to the amount of L. 1090. 15s. 6d. payable four months after date. On the 21st April 1801, James Connel, at the desire of Morison, discounted one of these bills, to the amount of L. 200 Sterling; and deducted the interest, at the rate of five per cent. till the bill became payable, and L. 2 Sterling in name of commission.

On the 23d April 1801, a bill for L. 445. 7s. 9d. and on the 2d of May another bill for L. 445. 7s. 9d. were in like manner discounted; and for these the sum of L. 8. 18s. in name of commission was deducted, besides the interest, at the rate of five per cent. for the period till the bills became due. Thus, a deduction was made at the rate of nine per cent. at discounting these bills.

Having become bankrupt, Morison, at the desire of his creditors, raised an action against Connel, narrating the statute 12th Anne, § 11. c. 16. and libelling that Connel, "*upon the* 21*st April* 1801, *on the* "*pursuer's indorsation, discounted one of them,* (i. e. *the before mentioned bills,*) *of the value of L.*200; *and, upon the* 23*d day of the same* "*month, he discounted another on the pursuer's indorsation, of the value of L.*445. 7*s.* 9*d.*; *and a third on the pursuer's indorsation, of the* "*like value of L.* 445. 7*s.* 9*d.*" for the doing of which the defender exacted the sum of L. 10. 18s. besides the legal interest; and concluding for treble value of the principal sums on which usurious interest had been charged. The summons was executed on the 29th April 1802.

In defence, the defender stated that the summons was not executed till the expiry of more than a year from the date of the alleged criminal acts therein libelled: That by the statute of 31st Eliz. c. 6. § 5. introducing the limitation of penal statutes, action must be "had, brought, "sued, or commenced within one year next after the offence committed;" and, therefore, prescription having elapsed, all inquiry into the matter was precluded. Although the 31st Eliz. c. 6. § 5. was an English statute, yet it has already been found to apply to Scotland in as far as it affects or controuls the operation of British statutes relating to the trade of both parts of the kingdom, 13th January 1747, Booksellers of London against Booksellers of Edinburgh, *Falc.* Ersk. b. 4. tit. 4. § 110. b. 2. tit. 12. § 22.

By the 18th article of Union, the laws relating to trade are declared to be the same in both parts of the kingdom; the statute of Anne, however, is a general mercantile regulation, intended for the benefit of trade, and ought to be interpreted in each in the same way. Hence it is that the statute James I. respecting monopolies, is held to apply to Scotland. Nay, the preamble of the statute of Anne, in as far as it narrates the various reductions of the rate of interest, refers to the 37th Henry VIII. c. 9.—13th Eliz. c. 8.—21st James I. c. 17.—12th Charles II. c. 13. which are all English statutes. In just and fair construction, therefore, the legislature must be presumed to have had in view the statute of Elizabeth, limiting penal statutes; and if there be any advantage in this limitation of the act, the subjects in Scotland are entitled to it by the articles of Union.

The pursuer maintained, that the statute of Elizabeth was an English statute, which could have no operation in Scotland, not only because it had no relation to trade, but because it related to the law of prescription, on which Scotland already possessed a peculiar code, connected and corresponding with the other institutions of her municipal law. By the articles of Union, Scotland is protected from any alteration of her municipal law; and, therefore, all British statutes must, as far as possible, be interpreted consistently with this important article of the national compact. In passing this act, the legislature must have intended that it was to be enforced according to the laws of the respective kingdoms, in the same way as if two acts had been passed, the one in addition to the former laws of England, the other in addition to the former laws of Scotland. Accordingly the Court have already so understood and decided this point, 2d Dec. 1766, M'Kechnie against Wallace,—17th Jan. 1775, Wilson against Jackson.

The Lord Ordinary pronounced the following interlocutor, (Nov. 12. 1802,) "Finds that, as by the 18th article of the treaty of Union, the "laws concerning the regulation of trade are declared to be the same in "Scotland as in England; so that the statute 12th Queen Anne against "usury being intended for the regulation of trade, that statute must "have the same, and neither more nor less operation in Scotland than "it has in England: Finds, that as all actions pursued in England on "the said statute of Queen Anne against usury would be subject to the "general limitation of penal statutes enacted by 31st Eliz. c. 5. so it "must be held that the said statute against usury, which is a British act, "extending to both parts of the united kingdom, and regulating trade "and commerce within the same, must be subject to the same limitation in both; therefore finds that the present penal action, which is "laid solely on the statute of Queen Anne, is barred by the act 31st "Eliz. c. 5. in respect it was not brought by the pursuer till after the "elapse of a year from the commission of the alleged offence."

The Lord Ordinary afterwards reported the case to the Court on memorials; and the following interlocutor was pronounced, (Nov. 24. 1807,) "Find that the defence of prescription under the act of Queen Elizabeth, applies to the first bill discounted upon the 21st day of April "1801, in respect the same was settled a year before the commencement of the action; sustain the said defence accordingly, and in so

"far

" far assoilzie the defender, and decern; and as to the second bill dis-
" counted upon the 23d April 1801, before answer, appoint the defen-
" der to give in a condescendence as to the precise time when, and mode
" in which the same was settled, and how far the defence of prescrip-
" tion applies to that point; and repel the defence of prescription as to
" the third bill; and appoint the parties to give in memorials upon the
" merits of the question."

Against this interlocutor, in so far as it authorised investigation into the circumstances of the second and third acts of usury, the defender reclaimed to the Court, on the ground that these were not charged in the libel with sufficient accuracy and precision.

And, on advising the petition with answers, (June 24. 1808,) the Lords assoilzied the defenders.

Lord Ordinary, *Woodhouselee.* Act. *Jo. Clerk* et *W. Clerk.* Alt. *David Williamson* et *J. A Murray.* *Ja. Marshall*, W. S. and *Gibson, Christie, & Wardlaw*, W. S. Agents. *S.* Clerk.

J. W.

No. LXIII. *June* 28. 1808.

THOMAS STEVENSON,

AGAINST

JAMES DALRYMPLE.

SALE.—*Delay in notifying the rejection of goods sent on commission, and using part of them, will take away the right of rejecting them, though the quality be bad.*

DONALD MARTIN, agent for James Stevenson merchant in Greenock, sold to James Dalrymple, soap-boiler in Falkirk, 22 tons of kelp, at L. 8 per ton, the selling price being at that time from L. 7 to L. 10. In the letters he wrote to Dalrymple, offering this kelp for sale, he mentions that it was " pretty good, but not of the best quality." that he must deliver it at Greenock; and that, " to prevent reflection, " he would be glad to have a correspondent there to examine the quali-" ty." Dalrymple directed the kelp to be shipped for Leith without any inspection on his part. It was shipped accordingly on the 5th of August 1803; and Dalrymple received it certainly not later than the 21st of that month. On the 22d he accepted bills for the price of it. He made no objection to the quality of it till the 10th of September, when he wrote to Martin that he had tried the kelp, that it was so bad

as

as to be unfit for making soap, and that he was willing to allow any soap-boiler to be fixed on by Martin himself, and sent there at their mutual expence, to try it in his own manufactory in any way he pleased. Martin in reply refused to have any thing more to do with it. He indorsed the bills for the price to Stevenson, who raised diligence upon them against Dalrymple. Dalrymple presented bills of suspension, which were passed. The action came, in the usual way, into the Inner-house. The Lord Ordinary (June 27. 1804,) remitted to Dr Jamieson, professor of natural history, to report on the quality of the kelp, and authorised it to be sold by public roup. Dr Jamieson reported, that "it had "lost about two thirds of its value, and was therefore useless to the soap-"maker: That it appeared originally to have been indifferently manufactured, "and had since suffered from exposure." The kelp was sold; and the price obtained was only L.3. 16s. per ton. But it appeared that 6 tons 8½ cwt. had been used by the defender before he made the objection to its quality.

The suspender averred, that he notified his refusal of the kelp as soon as he discovered its quality; but that this did not appear till he had occasion to make soap with it exclusively, and that he had no such opportunity till some other kelp he was using was exhausted. That the quantity used by him had been used in this making of soap, and in some prior makings where it had been mixed with kelp, so good as to cover its bad quality. That it had been kept in a dry place, and exposed to no injury till used in making soap, and had, when tried by itself, been found quite unfit for that purpose.

The Lord Ordinary's interlocutor was, (December 6. 1805,) "Finds "that the kelp in question, for which the bills charged upon were "granted, was of a very inferior quality, and unfit for soap-making, for "which purpose it was sold and bought. Finds that 16 tons 1½ cwt. "of said kelp, when sold by public roup under authority of the Lord "Ordinary, only produced L. 3. 16s. per ton. Finds the suspender "must be liable for 6 tons 8½ cwt. at the rate which it appears had been "used or consumed by the suspender of the original quantity of 22½ "tons, amounting to L.24. 8s. 3d. Finds the letters orderly proceeded "to that extent, but, *quoad ultra*, suspends the letters simpliciter, and de-"cerns."

The cause came before the Inner-house by petition and answers—at advising which the court adhered to the interlocutor of the Lord Ordinary.

On advising a second petition and answers, the Court "altered the in-"terlocutor reclaimed against, and found the letters orderly proceeded.

A petition reclaiming against this interlocutor was presented by Dalrymple; but the Court, (June 28. 1808) "refused it without answers."

The opinion of the majority of the judges appeared to be, that there was sufficient reason to believe, or at least to allow a proof, that the kelp had been of bad quality originally, and not such as answered the description "of pretty good kelp at L.8 per ton," or was fit for making soap. But they thought that by receiving the article, and giving bills for the price, keeping it so long, and using part of it without objecting to its quality, the suspender had lost all right of refusing to pay the price upon

upon any such objection; and that it would be dangerous, by admitting such exceptions, to shake the established and salutary rule of practice on that head.

Lord Ordinary, *Balmuto.* Act. *J. A. Murray.* Alt. *John Cunningham.*
W. Whyte and *Ja. Gibson*, W. S. Agents. *W.* Clerk.

M.

NO. LXIV. *5th July* 1808.

JAMES and DAVID PATERSON,

AGAINST

DAVID CALDER and his CURATOR *ad litem.*

SOCIETY.—*The heir of* A, *a partner of a Company, and an* obligee *in a bond of cash-credit for sums to be drawn by* B, *another partner of that Company, in name of the Company, is bound for sums drawn by* B *in that name, after the Company has been dissolved by the death of* A, *no notice of that event having been given to the bank granting the credit.*

IN the year 1801, a bond was granted to Carrick and Company bankers in Glasgow, by Archibald Paterson, Archibald Calder, and John Aitchison, who formed a Company, under the firm of Archibald Paterson and Company, and by James Paterson and David Paterson, who were not copartners of that Company, "For L.400 Sterling, or such "sum or sums as I the said Archibald Paterson shall draw out by drafts "or orders on, or receipts to, the cashier of the said Banking Company, "(signed) *Archibald Paterson and Company.*" The two latter obligants of course were only cautioners, though nothing was said on that subject in the bond. In January 1802, Archibald Calder died. No notice of his death was given to Carrick and Company, though it was said to have been notified in the newspapers.

At the time of Archibald Calder's death, the debt to Carrick and Company, on the cash-credit, amounted to L.390; but it was said that the remaining partners paid up the whole of this sum upon the 25th June 1803. Notwithstanding all this, Archibald Paterson continued to draw money from Carrick and Company by drafts or receipts in the name of *Archibald Paterson and Company* down to the 5th November 1803.

At that period the balance due to Carrick and Company amounted to L.432. 9s. 7d. Of this sum Carrick and Company demanded payment from James and David Paterson, cautioners in the bond of cash-credit, Archibald Paterson being then unable to pay it. James and David Paterson paid it on receiving an assignation for their relief against the

principal debtors. On this assignation they brought an action for total relief against David Calder, the son and heir of Archibald Calder, to whom Ninian Hill was appointed curator *ad litem*.

The Lord Ordinary's interlocutor was, " Finds that the cash account, " for the balance of which the present action is brought against the de- " fenders, was granted by Carrick, Brown, and Company, to and for be- " hoof of the copartnery of Archibald Paterson and Company of Glas- " gow: Finds that the said copartnery of Archibald Paterson and Com- " pany was dissolved by the death of Archibald Calder, one of the " partners thereof, in the month of January 1802: Finds that the heirs " of the said Archibald Calder cannot be liable, for any contractions or " debts incurred by the remaining partners of the said Company after " the period of its dissolution, which, *quoad* any mercantile house in " Glasgow, needed no formal or public intimation, being an event suf- " ficiently notorious; therefore, and in respect the debt pursued for ap- " pears to have been entirely contracted after the said dissolution, assoil- " zies the defenders from the present action."

A petition was presented against this interlocutor to the Court; on advising which, the Court, of this date, (10th December 1805,) remitted " to the Lord Ordinary to hear parties further, and to do therein as he " shall see cause."

The case was accordingly stated to the Lord Ordinary in a representation; when the Lord Ordinary reported it on informations.

On advising these the court found, " In terms of the judgement for- " merly pronounced by the Lord Ordinary, that the heirs of Archibald " Calder are not liable in relief to the pursuers for any debt contracted " in consequence of the operations upon the cash account granted by " Carrick, Brown, and Company, subsequent to the death of the said " William," (should be Archibald) " Calder; and remit to the Lord Or- " dinary to hear parties procurators on the remaining points of the " cause."

On petition against this interlocutor and answers (June 10. 1808,) the court altered it; and " Decerned against the defender in terms of the con- " clusions of the libel."

A petition against this interlocutor was refused without answers, (5th July 1808,).

The opinion of the court was, that the bank had a clear claim against the pursuers as co-obligants in the bond for all sums that were drawn out *by Archibald Paterson in name of Archibald Paterson and Company*: That it was sufficient for the bank that the sums were drawn by him in that name; they were not bound to inquire in what state this company was, or to look at all beyond Archibald Paterson: That if he signed in the manner agreed on, that authorised the bank to advance money on the cash credit, and bound all the obligants in the bond to repay it to the bank. But that though the pursuers were bound as co-obligants to the bank, yet in reality they were only cautioners for the other obligants, the partners of *Archibald Paterson and Company*, for whose behoof the cash credit to Archibald Paterson was granted.—The pursuers must, therefore, have a right of relief against these principal obligants, and equally against their heirs: That even if the other partners could, in relation to the bank, be viewed

viewed in the light of cautioners for Archibald Paterson, in whose favour the cash credit was directly granted, yet, as it was granted for their own behoof, they were principals in relation to the pursuer. But in either capacity their heirs were equally liable. As principals it could not be disputed, and as cautioners they were liable by the decision in the case of the College of Glasgow, 18th November 1790.

Lord Ordinary, *Woodhouselee.* Act. *Maconochie.* Alt. *Henry Cockburn.*
John Mowbray, W. S. and *N. Hill*, W. S. Agents. *S.* Clerk.

M.

No. LXV. *July* 5. 1808.

Mrs CHARITY and Others,

AGAINST

WILLIAM RIDDELL.

Nuisance.—Public Police.—*A glue work, although in a district of the burgh which had been occupied and frequented for time immemorial by various kinds of nauseous manufactories, was so far declared to be a nuisance, that it could not be placed nearer the dwelling-houses and streets than it had formerly been.*

THAT quarter of the town of Glasgow on the south side of Bridgegate Street, included within Bridgegate Street on the north, Slaughterhouse Lane on the south, Cow Lane on the west, and Merchant Lane on the east, has been for time immemorial occupied and frequented by tan-pits, glue-works, soap manufactories, curriers shades, and skinneries, and the slaughter-house of the city—all nauseous manufactories, of which the vicinity has been in contemplation of law considered to be nuisances.

In the projected improvements of the city likewise, for which a bill had passed through Parliament, a considerable portion of this district was to be occupied by, and converted into great public *slaughter houses* for the accommodation of the town.

In this district the pursuer and defender possessed contiguous properties.

The property of the pursuer consisted of a range of houses lately rebuilt, and forming commodious dwelling houses.

The property of the defender lay adjacent and parallel, and consisted of a dwelling-house, then a bake-house, and then, at the remote end of the tenement, a glue-work.

The

The two tenements were separated by a narrow common area. The glue-work had subsisted for many years; but it was opposite at one end only to a small part of the pursuer's property.

In this relative situation of the respective properties, the defender proceeded to make an addition to the glue-work, equal to, or surpassing in magnitude, the old manufactory, which would have been adjacent to the greater and more valuable part of the pursuer's dwelling-houses, would have increased the extent and violence of the nuisance formerly existing, and brought it nearer to the pursuer's dwellings. The pursuer and certain other proprietors, with concurrence of the procurator-fiscal, instituted a process before the Dean of Guild court, concluding for an interdict against the defender. A remit was made to two medical gentlemen, Dr Robert Cleghorn and Mr Coupar, to ascertain whether the vicinity of a glue-work was deleterious to health. The report was in the following terms.

"Though the manufacture of glue, like every other in which animal "substances are exposed to a boiling heat, may occasionally emit a smell "somewhat offensive, and can in no case be a desirable object in a neigh-"bourhood; yet when the process is properly carried on, with strict at-"tention to cleanliness, and particularly to the removal of all filth and "refuse before it has advanced to the high degree of putrefaction, a thing "quite practicable, but not always attended to so much as it ought to "be, we know no fact, either from the nature of the process, or from the "experience of the workmen, whence it can be justly inferred that the "manufacture of glue is hurtful to the health of a neighbourhood."

(Signed) "ROB. CLEGHORN, M. D.
"WILLIAM COUPAR."

A report was likewise made by the town-clerks, touching the law of the case.

The Dean of Guild then pronounced the following interlocutor (8th October 1807): "Finds that the glue-work proposed to be erected by "the defender, although not necessarily hurtful to the health of the "inhabitants in the neighbourhood, will render the enjoyment of life "and property uncomfortable to the inhabitants, and will lessen the "value of the adjacent tenement; and therefore finds the said propos-"ed erection is a nuisance; continue the interdict formerly granted; "and decern."

The case was brought by advocation before the Lord Justice Clerk, Ordinary, who advocated, and remitted to the Dean of Guild to alter the interlocutor, and recal the interdict; and, on reconsidering the case, pronounced the following interlocutor (11th March 1808.): "In respect "it appears that the pursuer's tenement is in the immediate vicinity of "the great public shambles of Glasgow, and of several other glue-works, "as well as skinners yards, candle-works, soap-works; finds that the "proposed small addition to the respondent's glue-work cannot materially "increase either the danger or inconvenience which must already result "to the pursuer's tenements from the above neighbourhood; and in re-"spect that it appears that this quarter of the town, from time immemo-"rial, has been frequented by works and manufactures of the above de-"scription, refuses this representation."

The

The cause came before the Inner-House by petition and answers.

Some of the Judges were of opinion, that as this manufactory, and many others almost as nauseous, had immemorially existed in the vicinity, and as this quarter of the town had been appropriated to manufactures, which, however nauseous, are nevertheless necessary to every civilized community, the interlocutor of the Lord Ordinary ought to be adhered to. Besides, as the defenders had right to, and the pursuer had acquiesced in the establishment of a glue manufactory in the vicinity of her dwelling, the former must be entitled to extend it according to the increase of his trade. But a great majority of the Court differed in opinion from the Lord Ordinary; and observed,

A glue-work is a very intolerable nuisance, more nauseous than any other manufacture of which the materials are composed of animal matters, that of Prussian blue, perhaps, excepted. The previous existence of other and similar nuisances in the vicinity does not warrant the introduction of new, or the material extension of old, nuisances. The proposed addition, however, would increase the extent of the former manufactory, and bring it nearer to the dwellings of the pursuer. That, from acquiescence, or other causes, several nauseous manufactories had been created in the neighbourhood, beyond the power of legal interference, formed no ground for concluding that the pursuer is bound to submit to the establishments of others more extensive in size, and therefore more nauseous, aggravated, and virulent in their nature. No doubt the circumjacency of the different manufactures has rendered these houses less agreeable to inhabit, has diminished the value of the property, and the acquiescence of the pursuer or her authors in these, now debars complaint. But to permit the extension and nearer approach of these at the pleasure of the manufacturers, would reduce the value of the tenement to nothing, and drive the pursuer altogether from her residence.

The Court pronounced the following interlocutor (June 11th 1808.): "Alter the interlocutor of the Lord Ordinary reclaimed against, and remit to his Lordship to remit the cause simpliciter to the Dean of Guild of Glasgow, but find no expences due to the petitioners."

On advising a petition, without answers, the Lords adhered (5th July 1808.)

Lord Ordinary, *Justice Clerk.* Act. *John Jardine.* Alt. *Ro. Forsyth.*
Jo. Mackenzie and *A. R. Millar*, W. S. Agents. *B.* Clerk.

J. W.

No. LXVI. *July 5.* 1808.

BAKERS OF PERTH

AGAINST

JOHN GLOAG, JAMES STEWART, and Others.

Burgh-Royal.—Exclusive Privilege.—*A society formed by a very large number of the inhabitants of a royal burgh, for the purpose of establishing a bakehouse out of the burgh, and supplying themselves and their own families with bread, is not contrary to the privileges of the corporation of bakers in that burgh.*

In the year 1800, a great number of the inhabitants of Perth and the neighbourhood, dissatisfied (as it seemed) with the manner in which they were supplied with bread by the bakers of that town, formed a society for supplying themselves with this commodity. Their articles of agreement were the following:

1st August 1800.

Art. 1. This association to be called the Perth Wheaten Bread Society, for the benefit of the Subscribers.

Art. 2. The number of Subscribers not to be less than one hundred, and no smaller subscriptions than one guinea; and for each half-guinea subscribed, to have one quartern loaf weekly delivered at their houses, if within the town and near its vicinity; the money so subscribed to remain as a fund for the purchasing of grain or flour for the benefit of the society.

Art. 3. Any member disposing of his bread, or any part of it, at an advanced price, so soon as the same can be proved, shall forfeit his right and claim to the society.

Art. 4. The business of the society to be under the management of twenty of their own members as a committee to be chosen annually, preses and clerk included in that number, who are to be chosen by the committee.

Art. 5. That the committee shall stand responsible for their intromissions of stock.

Art. 6. That the committee shall meet as they shall think proper, for the managing the business of the society.

Art. 7. That the committee shall open an account with the bank on the society's account, where the treasurer shall deposit what cash he has received, when it amounts to ten pounds or upwards.

Art. 8. That any member has the liberty to make a transfer of his part of the stock.

Art. 9. That the society, when constituted, reserve to themselves the power of altering or amending any of the above regulations, as they shall see proper.

Under

Under these articles several hundred subscribers, partly inhabitants of the town, partly of the vicinity, having joined, the society built a bakehouse without the burgh, purchased flour, and employed workmen to bake it, as well as to distribute the loaves among the subscribers, and receive the (prime cost) price of them for the society. It did not appear that any of the members violated the articles by selling the bread they received, or that there was any departure in any respect from the scheme there laid down. In this way the society continued for about three years and a half, when the Corporation of Bakers of Perth (alarmed probably by the appearance of a new scheme of a similar nature) presented a petition to the Sheriff, praying to have this society prohibited " from bak- " ing bread for the use of themselves, or any other inhabitants of the " town of Perth, or of distributing or retailing the same in any way."

The Sheriff, that the facts of the case might be ascertained, in the first instance, ordered the pursuers to produce the titles of their corporate rights; and allowed a proof to both parties. The pursuers produced no regular charter or seal of cause, but various documents, which, with the parole evidence, sufficiently established (as seemed to be admitted) that they were possessed of the ordinary privileges of an incorporate craft in a royal burgh.

The Sheriff pronounced this interlocutor, (10th September 1806): " Finds, that an association, called the Perth Wheaten Bread Society, has " been formed for the purpose of purchasing flour, and baking bread for " the use of the members of that society, under a provision, that no " member should be permitted to dispose of any part of his bread at an " advanced price: Finds that bread has been baked by that society with- " out the town of Perth, and delivered to members of the society, some " of whom reside within, and some without the town of Perth: Finds " that by the decisions of the Court of Session, when applied to the " Baker Incorporation of Perth, the said Corporation do not possess the " exclusive privilege of selling bread within the town of Perth, but pos- " sess the exclusive privilege of baking bread for sale within the town of " Perth: Finds that by the decisions of the Court of Session, a person, " not a member of the Incorporation of Bakers, cannot sell bread within " the town which has been baked by himself without the town: Finds " that by law, an individual or individuals, not members of the incorpora- " tion of Bakers, may bake bread *in their own houses* for their own use: " Finds it not proved that the members of the society in question have " sold bread to others, or have baked bread except for their own use; " and therefore on the whole dismisses the present action, and assoilzies " the defenders."

The pursuers presented a bill of advocation to the Court of Session, which was passed, and they at the same time brought an action of declarator in that Court. By this time another society of the same nature with that above described, was formed in Perth; and accordingly, in the summons of declarator, the Corporation of Bakers called the members of both societies. This summons, setting forth the constitution and operations of both societies, concluded to have it declared, that the pursuers had a right to debar these persons " from baking, either in a bakehouse within " the liberties, or in a bakehouse situated without the liberties of the said " corporation,

" corporation, bread of any kind or description, to be sold, distributed, or " otherwise disposed of, for the use and subsistence of the lieges living " within the said burgh of Perth, its liberties and privileges." The processes of advocation and declarator were conjoined. The Lord Ordinary pronounced this interlocutor:

" In respect the Lord Ordinary concurs with the opinion of the She- " riff of Perthshire, in the process of advocation,—disjoins the said pro- " cess from the process of declarator, and remits the cause simpliciter, and " decerns: and in the process of declarator, dismisses the same, and as- " soilzies the defenders.

The pursuers reclaimed.

On advising their petition, with answers, the Court (19th May 1808) " Adhered to the interlocutor of the Lord Ordinary."

The cause came again before the Court, in a second reclaiming petition and answers.

Argument for pursuers.

The privileges of corporate trades undoubtedly form part of the law of the land. The political expediency of that part has been of late called in question by speculative men. But speculation has not been confined to the privileges of corporations; and no speculative lawyer ever imagined that laws were to vanish whenever their expediency became doubtful. If, then, the rights of corporate trades exist in our law, they are entitled to a fair interpretation, and a sufficient protection. They are not to be annihilated at pleasure by flimsy pretexts, as if there existed no objection to destroying them, but a mere difficulty in form. They are substantial rights, acquired and maintained by submitting to considerable burdens, and the complete destruction of them, without any compensation, must be regarded as a great immediate evil, and a most perilous precedent.

But the societies in question are nothing else than contrivances for the avowed, or at least obvious and direct purpose of destroying the corporate privileges of the pursuers; contrivances by which inhabitants of burghs, not freemen bakers, are to take the baker craft of the burgh into their own hands, to the exclusion of the freemen bakers. For this reason alone they ought not to be permitted, even though it were shewn that they could in form be justified by the extreme application of some of the rules that have been derived from our decisions on the subject of corporate trades. It would then be clear that these decisions had been given without sufficient consideration; for the Court, when they pronounced these decisions, certainly had no intention of extinguishing the rights of corporations, but the reverse.

The pursuers, however, deny that any rule to be found in our decisions, carried to its utmost latitude, can justify the societies in question. It is admitted by the defenders, that they supply a number of the inhabitants of the burgh with bread; but two defences are offered; it is said,

1st,

1*st*, They do not manufacture their bread within the burgh, and therefore may deliver it within to those who commission it.

The pursuers admit that it has been decided that the inhabitants of burghs may supply themselves, by purchasing from unfree workmen residing and working out of the burgh, and that these unfreemen may even deliver commodities within the burgh to those who purchased these commodities without it. But then these unfree manufacturers have no connection with the burgh at all. They are not inhabitants; and have no more to do with it than carriers who deliver goods manufactured at the other end of the kingdom. Such has been the situation of the unfree manufacturers in all those cases decided against incorporate crafts, in favour of free importation of commodities into burgh. Those cases still left the corporate tradesmen the advantage of being the only men of their trade living in the burgh. They could not only deliver commodities there, but sell them there, and take and seek for employment there, where it was best to be found. But it never was decided, that men living in the burgh, might supply the inhabitants of the burgh with the commodities that were the subject of any of the corporate crafts, from a manufactory, whether within or without the burgh, unless they were free of that craft. It is impossible this should be allowed, not only because it would extinguish the corporate privileges altogether, but because no latitude of interpretation could admit that a man, living within a burgh, and supplying the inhabitants with the subject of a trade manufactured and delivered by himself, was not exercising that trade. The circumstance of their work-shop being on the outside of the walls, cannot therefore afford a sufficient justification to the defenders, if they, living within burgh, supply the inhabitants with bread.

2dly, It is said that they do not supply any body but themselves, and that they may do this either separately or by a combination.

This is a distinct argument; and, if good, would equally justify them though their bakehouse were in the burgh. But it is obviously impossible to stretch this indulgence to such a length. To prevent individuals baking for their own use within burgh was impossible; and it was very little necessary for the beneficial use of the corporation right, as the corporation was in no danger from the competition of such bakers. Such baking, too, did not, in ordinary language, figure as the *baker craft*; and, therefore, it was allowed notwithstanding the corporate privilege. But when a number of individuals, inhabitants of a town, come to a baker, and say to him, "we wish to set up a bakehouse; we shall furnish you "with a workshop and capital, pay you for your trouble, and you shall "bake and sell bread for our behoof;" this seems certainly to be setting up the baker craft. It matters not that they say, "you shall sell bread "to none but ourselves;" if their numbers are sufficiently great, that can be of no consequence. The full trade of a baker is exercised without going beyond them for custom. The profits of this trade to be sure are divided among a great number, but the trade is still exactly the same. That is just the present case. The full craft of a baker is exercised to a great extent by these societies, and therefore they cannot be justified by pretending that they bake only for themselves. It was only because

baking of this sort did not interfere materially with the exercise of corporate rights, and did not amount strictly to exercising the baker craft, that it was allowed; but if it can be so combined as to do both in the plainest manner, the reasons for allowing it no longer apply.

It is submitted, in the *last* place, that to form a combination, of which the direct object is to destroy the privilege of a corporation of the burgh of Perth, is contrary to the duty of the inhabitants of the burgh. The Magistrates acted for behoof of the burgh itself, that is, of all its inhabitants, in granting such privileges; and having so granted them, neither the Magistrates, nor the people for whom they acted, can, without injustice, render such grants wholly ineffectual. If it has become inexpedient to continue them, let them be taken away by act of Parliament, and for an equivalent, but not in this way.

Argument for defenders.

The whole argument of the pursuers is founded upon an assumption that two things are the same, which are quite different, viz. violating a right, and doing what renders the exercise of that right less advantageous. The defenders certainly have done, and mean to do the last, but not the first.

The last is clearly not a thing which a court of law can prohibit. There are a thousand uses of property that render the use of property in others less advantageous, which yet no body pretends to prohibit. In this very case, many things, unquestionably legal, must have in fact diminished the advantage arising from the pursuers privilege. The use and sale of potatoes is an instance. Nor is there any limit to the effect that such things may produce without being unlawful. They may wholly extinguish the value of rights without giving any right to complain. Though potatoes should be brought to such perfection as to supersede bread and extinguish the corporation of bakers altogether, that would give them no right to prohibit the use or the sale of potatoes; and things of this sort, it will be observed, may be done not merely by individuals, but by combinations to any extent. If 5000 people should join in raising or importing potatoes, it would not become at all more illegal on that account. The mere circumstance of combining is neither good nor bad. It depends entirely on the object of the combination whether it is illegal or not. In so far, therefore, as the pursuers say that, by the operations of the defenders, the advantage of possessing their exclusive incorporate right will be diminished, the defenders do not deny the fact, but they deny that it is at all relevant. The Court are bound to secure to them the possession of their right, but not at all to provide that the possession of that right shall always remain equally profitable. It may be, that when corporation privileges were granted, they were expected to remain equally profitable. All laws that depart from the great principles of equity and expediency are liable to fail in producing their intended effect; but that is no reason for courts of justice making them more effectual by still greater encroachments upon these principles. The defenders cannot, therefore, suppose that the Court will reverse its decisions, and devise

devise new restrictions on the inhabitants of royal burghs, in order to render the rights of corporations profitable.

It is necessary then for the pursuers to shew that their right has been violated; that is the proper point of dispute.

The exclusive right of the pursuers is not absolutely that of supplying the town of Perth with bread, but merely that of vending in the town bread baked by themselves.—See case of Hammermen of Glasgow, 18th Jan. 1757, *Kames*. Unfreemen may undoubtedly carry into the town and deliver there bread that is baked out of it, if it be previously commissioned, though they cannot have a shop *. Now, if the defenders supplied all the other inhabitants of Perth, they would still be keeping within this line, and not violating the corporation privilege; for their bakehouse is without the town, and they have no place of sale, nor do they sell any bread within it; they do no more than deliver bread baked out of the town to those who have previously commissioned it. It is said that *inhabitants* of a town cannot do this; but no authority can be given for this doctrine. It evidently is of no importance in such questions where a man himself lives; the point of importance is, where his workshop or sale shop is. All unfreemen who carry commodities manufactured out of burghs, into them to deliver on commission, must remain a considerable time in burgh. Can it be said how long they are to stay there? or was there ever an instance of a person prohibited from living in a burgh because he had without the walls a manufactory of articles of an incorporated trade, or a share in such manufactory? An inhabitant of Edinburgh, at that rate, must have no share in a manufactory in London, because the manufacture may be brought into Edinburgh. This is quite absurd, as well as destitute of authority.

But, *2dly*, The defenders do not supply any of the inhabitants of Perth besides themselves; and, for this separate reason, they do nothing contrary to the privilege of the pursuers.

It does not appear that the exclusive right of incorporated trades ever went so far as to prevent persons in burgh from manufacturing for their own consumption and that of their families; and it is a settled point of law, they may do so now. (Even an innkeeper was found entitled to manufacture for the supply of his inn.—Case of Maltmen of Glasgow, 10th Feb. 1749.) This may they do, not merely by their own hands, but by the hands of their servants. But if they may do this, there can be no reason why they may not manufacture for their own use *in company*, by using the same oven and the same servant or servants? This, accordingly, is all that is done in the present case. There is a joint bakehouse, and a joint stock of flour, for which each person pays exactly in proportion to the bread he receives. The original subscription, and the prime cost paid on receipt of the loaves, are both in this proportion. It is therefore precisely the same thing as if each person gave his flour to their common servant, whom they paid according to the work he did for each, and had that flour delivered back to him baked. This they

* See Coppersmiths of Edinburgh, 6th August 1768,—Goldsmiths of Edinburgh, 2d March 1802,—and Bakers of Haddington, 10th June 1807.

they might do past all controversy if they lived in the same house; and it can make no odds that they live in different houses. It is true, this is a better mode of baking for their own use than baking separately, and therefore will be more generally adopted, and diminish more the advantage which the corporation enjoys from the possession of their exclusive right; but it is no violation of that right. It is just like the use of an improved private oven, or any other better way which may be discovered of using the right of baking for their own consumption. It is not the exercise of the baker craft; for that consists in baking and selling to other people, and not in baking for private use in any way, however convenient.

As to the duty of the inhabitants to the burgh, in regard to corporations, they are bound to respect the corporate rights, whether expedient or not, so far as they go, but they are not bound by any duty to sacrifice their own convenience, and allow the general interest to suffer, in order to give the incorporations advantages which their rights are insufficient to secure to them. The corporation might just as well say, it was the duty of the inhabitants not to employ bakers residing out of the burgh, but they will not pretend that that is a legal duty.

The Court were much divided.—The majority thought that the first argument of the defenders was well founded, and was supported by the case of the bakers of Haddington, (10th June 1807.) Several Judges also declared their opinion, that the second argument was well founded; and it was particularly observed, that there was nothing unlawful in combinations to do what was in itself not injurious; and that the circumstance of baking for their own use, after the manner of professed bakers, was no test of exercising the craft of the corporation, since an hospital or a school might bake for its own use in that way.

Several judges thought, that the combination, being formed for the express and direct purpose of destroying the trade of the corporation, and rendering its rights nugatory, was illegal; and that baking for private use could not be allowed, if it assumed a form by which the full profits of the trade were drawn, however divided, and by which it tended so immediately to supersede the employment of the corporation.

The Interlocutor of Court was, (5th July 1808,) "Adhere to the interlocutor complained of."

Lord Ordinary, *Meadowbank*. Act. *George Jos. Bell*. Alt. *J. S. More*. *J. Murray* and *W. Ellis*, Agents. *P.* Clerk.

M.

No.

NO. LXVII. *July* 6. 1808.

SIMON FRASER, Esq. Sheriff of Inverness-shire,

AGAINST

HUGH ROBERT DUFF, Esq.

PROCESS.—*A summary complaint in the Court of Session by a Sheriff, for a contempt of his authority, is competent.*

MR DUFF having obstructed the community of the town of Inverness in exercising certain rights of property, or servitude, which they alleged they had to certain lands in the vicinity of the town, the Magistrates of that town applied to the Sheriff for an interdict prohibiting him from doing so. This process Mr Duff advocated to the Court of Session; and at the same time brought in that Court a declarator of his right to these lands.

While these processes were in dependence, he began to plough up the lands; on which the Magistrates presented a petition to the Sheriff, for an interdict against this. On Mr Duff's failing to answer the petition, the Sheriff granted the interdict.

Offended by this measure, Mr Duff appeared in the Circuit-Court at Inverness; and when the old form of calling on those who have any complaints to make against the Sheriff was gone through, he stood up, and delivered to the clerk a petition, in which he accused the Sheriff of oppression and breach of duty.

The Lord Justice-Clerk, who presided at the time in that Court, not thinking this a case of the nature for which that ancient form had been intended, and considering that it arose out of a matter already before the Court of Session, "declared that he would report the petition to the Lords "of Council and Session, at their meeting in November next."

His Lordship reported it accordingly, when Mr Duff did not appear to insist on his complaint; but the counsel for Mr Fraser moved that the determination of this matter might be superseded till he should have an opportunity of presenting a petition and complaint against Mr Duff.

He did accordingly give in a petition and complaint; in which, besides the above circumstances, he stated two very contemptuous letters which had been sent by Mr Duff to the Sheriff, on the same subject as that of his accusation in the Circuit-Court; and he prayed the Court to find Mr Duff liable in damages and a fine.

Answers were given for Mr Duff, who pleaded,—1*st*, That the Lord Justice-Clerk on the Circuit had no power to report to the Court of Session.

2dly, That the Sheriff-depute could not pursue for an injury of this sort by a summary petition, but by an ordinary action.

The Court were clear that both the report and summary petition were competent. It was observed, that Judges of Justiciary were expressly authorised by act 20 Geo. II. to certify causes either to the Court of Session or Justiciary; and that, though a Sheriff might by his own authority punish any contempt offered to himself, yet that it was equally competent, and more proper in many cases, to apply to the Court of Session: And in this case, as the parties were already in that Court, and the contempt arose in a matter there litigated, the form of a sumarmy petition and complaint was competent and proper.

Accordingly the Court (6th July 1808, signed 7th) sustained the complaint; and found the respondent liable in damages to the amount of one hundred guineas.

Lord Ordinary, *Justice-Clerk.* Act. *Robert Craigie.* Alt. *Ar. Fletcher.*
Coll Macdonald & C. Tait, W. S. Agents. *Ferrier*, Clerk.

No. LXVIII. *July* 9. 1808.

ANDREW MILLAR, Schoolmaster in the parish of Cambuslang,

AGAINST

WILLIAM JACKSON.

SCHOOLS.—*Act 43d Geo. III. ch. 54. anent schoolmasters salaries. By 2d and 5th sections of this act, it is declared, that within three months the heritors shall meet to accomplish its purposes; and within three months from the time when such meeting is or ought to have been held, the dissatisfied party may appeal to the quarter-sessions. These periods having elapsed, it was nevertheless found competent to call a meeting of the heritors.*

BY the act 43d Geo. III. ch. 54. it is enacted, "That from and after "the term of Whitsunday next, 1803, the salary of each parochial "schoolmaster, in every parish of Scotland, shall not be under the sum of "300 merks Scots per annum, nor above the sum of 400 merks Scots "per annum, except in the cases herein after mentioned."

Sect. 2. prescribes a period within which the heritors are to meet and settle the amount of the salaries: "And be it further enacted, *That with-*

"*in*

" *in three months after the passing of this act*, the heritors possessed of " the qualification required by this act, and the ministers of every parish, " shall hold a meeting, of which intimation shall be given from the pul- " pit immediately after divine service in the forenoon, and by circular " letters to be written by the ministers of the parish to such heritors hav- " ing the qualification prescribed by this act, who are non-resident, and " also by leaving a written notice at the mansion-house of every heritor, " whether resident or not, at least thirty free days before such meeting " shall take place; and on due consideration of the circumstances of the " particular parish, in respect of extent, population, and valued rent, and " the probable amount of the other emoluments of the schoolmaster's " office, such meeting shall judge and determine whether the school- " master's salary should be 300 merks Scots per annum, or 400 merks " Scots per annum, or such sum between these two sums as to such " meeting shall seem most suitable to the circumstances of the parish; " and shall fix and determine the amount of the schoolmaster's salary by " a resolution to be made at such meeting; a copy of which resolution, " signed by the preses of the meeting, shall be delivered to the school- " master of the parish, as his authority for collecting and receiving the " salary thereby fixed and determined, which shall be paid by the seve- " ral heritors at the same terms, apportioned among them in the same " manner, and with the same relief against their tenants as is provided " by the aforesaid act of Parliament of Scotland, passed in the year " 1696."

Sect. 5. prescribes a period within which the dissatisfied schoolmaster or heritor may respectively appeal to the quarter-sessions from the determination of the heritors.

Sect. 5. " Provided always, and be it enacted, That in case the heritors " and minister shall neglect or refuse to determine the amount of the " salary to be paid to the schoolmaster, according to the provisions of " the act; or in case any heritor, or the schoolmaster, shall be dissatis- " fied with the determination made, it shall be competent, *within three* " *months after such meeting ought to have been held, or such determina-* " *tion shall have been made*, for the schoolmaster to apply, or for such " person so dissatisfied to appeal, to the next quarter-session held for the " shire or stewartry within the bounds of which the parish or parish-kirk " lies, whose judgment shall be final; and no appeal, by advocation, sus- " pension, or otherwise, shall be admitted against the judgment given at " the quarter-session: Provided always, that no heritor of the parish, " from whence such appeal comes, shall vote upon such appeal at such " quarter-session."

It is declared by sect. 3d, " *That the salaries so fixed and determined, in* " *manner above directed*, shall continue to be salaries payable to the " schoolmaster of every parish for and during the period of 25 years " from and after the passing of this act."

The three months from the enactment of the statute, within which the heritors might meet, elapsed on 11th September 1803, and the three months within which the heritors or ministers might appeal, elapsed on December following, before any steps were taken under this act in the parish of Cambuslang.

On

On the 2d of February 1804, a meeting was held, which was attended by two of the heritors. One of the heritors stated, that the period pointed out by the statute, both for the meeting of the heritors, and appealing to the quarter-sessions, had elapsed, and that any proceedings, therefore, on the matter were illegal and incompetent. Nothing was done at this meeting.

Another meeting was called, and held on the 15th November 1804, which was adjourned to the 15th December following, in expectation of a better attendance of the heritors. This meeting was attended by the clergyman of the parish, and by the factor of Mr Hamilton Dundas of Westburn; and the sum of 385½ merks was given in augmentation of the schoolmaster's salary, and 14½ in lieu of a certain deficiency of garden ground, making in all 400 merks.

The Duke of Hamilton and Mr Jackson of Spittal having declined to pay their proportion, the pursuer raised an action concluding for payment.

The following defences were returned, "The meeting of the heritors "at Cambuslang, held on 15th December 1804, had no power to aug- "ment the salary of the schoolmaster of that parish; that even although "said meeting had possessed the power of augmenting, yet the circum- "stances of the parish did not warrant their doing so."

The case was discussed before the Lord Justice Clerk, Ordinary, who pronounced the following interlocutor (17th December 1807): "The "Lord Ordinary having considered the libel, with the defences, and act "of Parliament libelled on, and heard parties, procurators, sustains the "defences given in for William Jackson, Esq. assoilzies him from the "conclusions of the libel, and decerns."

The cause came by petition and answers before the Inner-House.

Several of the Judges agreed with the Lord Ordinary. It was observed, that the act had augmented the salary of all the schoolmasters in Scotland to 300 merks; and any further augmentation could only be obtained by calling a meeting of the heritors according to the form, and within the period prescribed by the statute. This period had expired, and nothing could be done for 25 years.

A considerable majority of the Court, however, were of opinion, that, in just and fair construction of the act, the claim of the schoolmaster was not foreclosed; a peremptory obligation is imposed on the heritors to meet within a certain period; but it is no where declared that if the schoolmaster shall acquiesce in a delay beyond this period, further proceeding should be null, or that it should, at a future period, be incompetent for the heritors to fulfill the obligation imposed on them by the statute.

The Court (9th July 1808) altered the interlocutor of the Lord Ordinary, and ordained the heritors to meet.

Lord Ordinary, *Justice-Clerk.* Act. *John Connell.* Alt. *John Jardine.* *John Patison*, W. S. and *Jas. Wylie*, W. S. Agents. *F.* Clerk.

J. W.

No.

No. LXIX. *July* 9. 1808.

JAMES RALSTON

AGAINST

ROBERT ROBB.

SALE.—WARRANDICE.—*The disease called the Running-thrush affecting the feet of a horse, constitutes unsoundness* *.

ON Saturday 5th September 1805, the pursuer, a horse-dealer in Edinburgh, sold to the defender, a farmer at Meadowhead, a young gray horse, warranted sound, at the price of 51 guineas. Before concluding the purchase, the defender gave the horse a short trial, and employed a farrier to inspect him.

The defender, after taking home the horse, discovered that its feet were affected with the disease called the *running-thrush*, which rendered it unsound. The animal remained in the possession of the purchaser during the intervening Sunday; and was returned on the morning of Monday the 7th September to the pursuer's stables. The defender having thus declined to keep the horse, and refusing to pay the price, the pursuer instituted an action to recover it.

On the 24th October 1805, the defender, on being served with the summons, applied to the Sheriff for a warrant to sell the horse by public roup. The warrant was granted accordingly; the horse was exposed to sale; and was purchased by a Mr Craig merchant in Edinburgh, at the price of L.36 Sterling.

The action came before the Lord Justice-Clerk, Ordinary. The pursuer offered to prove that the horse was sound at the time of the sale, had been sound from the period of its birth, never had been known to be lame while in the possession of the various individuals to whom in succession he had previously belonged, and was at that moment the property of a gentleman who considered it to be perfectly sound.—On the other hand, the defender offered to prove that the animal was unsound at the time of the sale, in consequence of being affected with the disease in his feet called the *running-thrush*.

A proof was accordingly taken; on considering which, the Lord Ordinary found,

"Finds it proved that the gray horse had running thrushes in his "feet, particularly in the far fore foot, at the time when he was sold by "the pursuer Ralston to the defender Robb: Finds, that the disease called

* On the same day, a seemingly opposite judgement was pronounced in another case; but the Court proceeded, in that case, on the specialty that the horse had not been returned *debito tempore*, and that the right of recourse had thereby been lost. 25th May 1808, Elliot against Douglas.

" led running thrushes, although capable of being cured, and sometimes " easily and speedily cured, does at the time render a horse unfit for tra- " velling on the high road; therefore, without pretending to understand " whether such a horse can be considered as a sound horse, finds that a " horse which cannot travel on the high road is not a marketable com- " modity, fit for the purpose for which he is intended: Finds, that every " seller is bound in law to warrant that his goods are marketable, fit for " the immediate use for which they are usually intended: Finds, that the " circumstance proved that the defender Robb did employ the farrier " Kinnell to examine the horse at the time of the bargain, is not relevant; " as any such examination by a purchaser either of horses, or of any " other commodity, does not prevent his claim of warrandice against the " seller, that his goods shall be marketable, and fit for sale, unless war- " randice be expressly waved; therefore assoilzies the defender, and de- " cerns; finds expences due, and allows an account to be given in."

The cause came before the Court by petition and answers.

In point of fact, the Court was satisfied from the proof that the horse at the time of the sale was affected by the *running-thrush*. The legal effect of this circumstance was debated.

Argument of the pursuer.

The disease of running-thrushes does not of itself constitute unsoundness. This disease exhibits itself in an infinite variety of degrees, from a mild stage, in which it produces no inconvenience, to that acrimonious stage in which it causes absolute corruption and destruction of the frog. It arises frequently from carelessness and inattention to cleanliness, and is prevented or removed by regular diet, cleanliness, and exercise. This habit, too, is not unfrequently reckoned by skilful persons to be useful to horses of a particular temperament. It operates as an evacuation and relief to foul and gross constitutions, and prevents the occurrence of various diseases. Such is the opinion of scientific farriers. (Taplin, vol. ii. p. 394.)

In the understanding and practice of those concerned in the trade of horse-selling, and in that of gentlemen of the turf, this disease is not accounted unsoundness, unless it produce actual lameness.

Argument for the defender.

The defender purchased a *sound* horse, and to this effect received warrandice. " The general acceptation of the word *sound* has ever been " and still is intended to convey an honourable and unequivocal assur- " ance of the perfect state both of the frame and bodily health of the " subject, without exception or ambiguity." (Taplin, vol. i. p. 15.) That running thrushes is a disease is admitted; and to argue that it is easily cured, is to acknowledge the previous existence of disease. At any rate, it is treated of as a disease in all works of farriery (Taplin, vol. i. p. 94; Blane's Outline, vol. ii. p. 718; D. Lainter, p. 140.) Whether the disease may originate in an imperfection in the general habit of body; whether it may arise from an injury induced on the feet from accident or carelessness; whether it may exist in a mild or virulent degree; and whether

it

it may admit of an easy and expeditious, or of a difficult and tedious cure; all these questions are totally irrelevant. The purchaser means to buy a sound horse, fit for the present purpose of the road, or field, and not requiring care and attention beyond that which is to be expected from a servant of ordinary skill.

This point has already been decided by the Court in a recent instance, involving circumstances much more unfavourable to the seller than those which accompany the present case *.

Some of the Judges were of opinion, that a running thrush in its early stage, and in its mildest and most innocent form, and where it did not produce actual lameness, did not, in the contemplation of law, render a horse unsound; and ought to be numbered among those slighter and more immaterial imperfections, of which the concealment did not void the sale, and to which warrandice did not apply.

A

* Mr Jardine W. S. against Major Campbell, 15th January 1806. This case is not reported; but the following are the facts in which it occurred.

On the 29th of April 1804, Mr Jardine writer to the signet, major of the First Regiment of Edinburgh Volunteers, purchased from Major Campbell of the 27th regiment of foot, a horse, intended for a charger, at the price of L.57. 15s. under an express warrandice of soundness.

Mr Jardine, before concluding the purchase, rode the horse; and upon this trial expressed himself perfectly satisfied, and paid the price.

After the horse had been in his possession for ten days (till the 9th May) it became lame; and on examination it was discovered that the animal had running thrushes.

Major Campbell refused to take back the horse, conceiving that, in the circumstances of the case, there could not be in law any recourse against him.

Mr Jardine raised an action, concluding for restitution of the price; and the cause was discussed before Lord Dunsinnan, Ordinary.

A proof was taken, wherein it was established, to the satisfaction of the Lord Ordinary and the Court, that previous to the sale, the horse had running thrushes.

In the mean time, the horse was sold by mutual consent; and was purchased by Colonel Fullarton at the price of L.39 Sterling.

The Lord Ordinary pronounced the following interlocutor (14th May 1805.) "Finds that "the horse in question, when purchased by the pursuer, as warranted sound, and paid for "as such, was affected with an ailment in his feet, known by the name of running thrushes; "which in a certain degree does impair the soundness of a horse, and consequently ought "to have been, but was not made known to the pursuer; therefore, finds the pursuer "entitled to repayment of the price which he paid to the defender, with interest thereof "from the term of payment, and the expence of keeping him until the horse was sold by "mutual consent, together with the expence of process: Finds the defender entitled to "receive the price which was paid for the horse by Colonel Fullarton, and decerns."

The defender reclaimed to the Court; and, besides an argument on the import of the proof, maintained, 1st, That running thrushes, unless causing actual and present lameness, do not constitute unsoundness. In support of this proposition was adduced the evidence of many persons familiar with the treatment, and acquainted with the peculiar maxims and principles which obtain in the sale of horses. Many very respectable persons deponed, that in their opinion, and in the understanding of the trade, running thrushes, not producing present lameness, did not constitute unsoundness; and was reckoned among those qualities or imperfections of a horse which might, or might not, affect the price, according to the caprice of the purchaser, and of which the concealment was honest and justifiable: 2dly, That there could be no recourse, as the horse had been kept by the pursuer for ten days, and was not therefore returned *debito tempore*.

The Court, however, on advising the petition, without answers, refused the desire thereof, and adhered to the interlocutor reclaimed against

And, on advising a second reclaiming petition, with answers, the Lords adhered.

A majority of the Judges, however, were of a different opinion, adopted the principles of which the interlocutor of the Lord Ordinary contains a summary, and observed—Under the warrandice of the sale, whether derived from the payment of the market price of a sound and unblemished horse, or from the express stipulation of the parties, the purchaser is entitled to have a horse immediately fit for its purpose. He is not understood in law to go to market with the view of purchasing a commodity of which he cannot have the immediate use,—which may require a course of medicine and care to render it fit for its purpose,—and which demands the exhibition of more than ordinary skill and expence to preserve it in a state of usefulness, or perhaps from utterly perishing. If, as alleged by the pursuer, the disease is so insignificant as to produce no inconvenience, or lameness, the communication of the fact to the purchaser will not reduce the price of the commodity in the market. If, on the other hand, it is a disease which, being known, diminishes the value and consequently the price, which is intimately and necessarily connected with lameness, of which a course of medicine and attention is required to accomplish the cure, and extraordinary skill to prevent the recurrence—the concealment of it must and ought to void the sale.

The peculiar principles of concealment which are vulgarly believed to obtain in transactions in the trade of horses, cannot receive any sanction in a court of justice. If such are really admitted and acted upon, they ought to be reprobated. The legal warrandice in the purchase of a horse must have the same extent as in the purchase of any other commodity, and cannot be cut down by distinctions which are more nice than honest. The prevention or abolition of concealments may tend in no slight degree to increase or restore the respectability of that department of trade.

Running thrushes are a disease which, whether considered as arising from a local injury or from a vicious habit, it required a certain degree of extraordinary care to prevent, alleviate, or remove; and while the disorder existed, the soundess of the animal, or its freedom from lameness, could not be depended upon for a day or an hour.

The Court (25th June 1808,) pronounced the following interlocutor: "The Lords having resumed consideration of this petition, and advised "the same with the answers thereto, they refuse the desire of the peti- "tion, and adhere to the interlocutor complained against."

And, on advising a reclaiming petition, (5th July 1808,) without answers, the Lords adhered.

Lord Ordinary, *Justice Clerk*. Act. *F. Jaffrey*. Alt. *David Monypenny*.
Rob. Grahame, W. S. and *Alex. Ponton*, Agents. *W.* Clerk.

J. W.

INDEX

OF THE

PRINCIPAL MATTERS CONTAINED IN THE FOREGOING DECISIONS.

A

ADJUDICATION. An alleged heir may, for the purpose of making up a title, grant a bond to trustees, and on that bond they may charge him to enter, adjudge the estate, and convey the adjudication to him. 1. Though the same alleged heir has already attempted to serve, and his service has been suspended by the effect of an appeal to the House of Lords. 2. Though the right of the truster to the estate is disputed *in toto*, and be under trial in the House of Lords. 3. Though he be heir of a strict entail. No. 24. *Robert Craigie and James Horne, trustees of Sir James Norcliffe Innes Ker, against Sir James Norcliffe Innes Ker, and against General Walter Ker, and John Bellenden Ker, January* 19, 1808.

ANNUALRENT. Interest is due on arrears of minister's augmented stipends, from the date of the process of augmentation to that of the decree of locality, without any charge upon the former decree, or even demand of payment, during that time. No. 53. *Robert Dawson against Sir James Pringle, June* 15. 1808.

APPEAL. An alledged heir may, for the purpose of making up a title, grant a bond to trustees, and on that bond they may charge him to enter, adjudge the estate, and convey the adjudication to him. 1st, Though the same alledged heir has already attempted to serve, and his service has been suspended by the effect of an appeal to the House of Lords. 2d, Though the right of the truster to the estate be disputed *in toto*, and be under trial in the House of Lords, Though he be heir of a strict entail. No. 24. *Robert Craigie and James Horne trustees of Sir James Norcliffe Innes Ker, against Sir James Norcliffe Innes Ker, and against General Walter Ker, and John Bellenden Ker, January* 19. 1808.

APPRENTICE. Apprentices to artificers in a town, are liable in the performance of statute-labour upon the high roads. No. 11. *John Mackay, Alexander Munro, and others, against the Justices of Peace in the county of Ross, November* 27. 1807.

ARRESTMENT. An admiralty arrestment of a vessel on the stocks is good. No. 50. *James Balfour against John Stein and others, June* 7. 1808.

B

BANK. A bank is entitled to plead compensation upon bills discounted by its agents, though the agents be liable to the bank for payment of the bills. No. 8. *Charles Ferrier, trust-disponee of Robinson and Company against British Linen Company, November* 20. 1807.

BANKRUPT. The circumstances that a caption was raised against a debtor, and that a messenger with that caption in his possession, but without instructions from the creditor to put the debtor in jail, and without displaying his blazon, or by any form executing the caption, but merely notifying that he had a caption, compelled the debtor to go with him to the chamber of the agent for the creditor, where he (the debtor) remained for an hour, and then was allowed to go away by the consent of the agent for the creditor, no execution being returned by the messenger, are not sufficient to constitute imprisonment in terms of the act 1696, c. 5. No. 38. *John Ewing, trustee on the Sequestrated Estate of Macalister and Bryson against William Jamieson, May* 17. 1808.

An indorsation of a bill in payment, in the ordinary course of trade, is not liable to reduction on the statute 1696, though it be within sixty days of the indorser's bankruptcy. No. 47, *James Dundas, trustee on the Sequestrated Estate of Richmond and Freebairn, against James Smith, June* 2. 1808

Imprisonment in terms of act 1695, what? Similar to case of Ewing against Jamieson, 17th May 1808. No. 55. *Alexander Lamont, trustee on the sequestrated estate of Lambert and Company, against Robert and William Stewart, June* 17. 1808.

BILL OF EXCHANGE. Noting a bill on the day of payment is good negotiation, though the protest be not extended till some days afterwards. No. 13. *Brown and Company against Hutchison Dunbar, December* 8. 1807.

An indorsation of a bill in payment, in the ordinary course of trade, is not liable to reduction on the statute 1696, though it be within sixty days of the indorser's bankruptcy. No. 47. *James Dundas, trustee on the sequestrated estate of Richmond and Freebairn, against James Smith, June* 2. 1808.

An

INDEX.

An acceptor of a bill "as security "jointly and severally," has not the benefit of the act 1695, ch. 5. No. 61. *John Sharp against Margaret Harvey and others, June* 24. 1808.

BURGH-ROYAL. A coachmaker may make iron-work for carriages within burgh, though not a member of the Incorporation of Hammermen. No. 16. *Hammermen of Canongate against John Carfrae, coachmaker in Canongate, December* 11. 1807.

A person, not free of the tailor craft, may sell, in a shop within burgh, clothes made by freemen tailors, and may take commissions to get clothes so made. No. 26. *Alexander Craig, deacon, and John Armour, sen. collector of the Corporation of Tailors in Glasgow, against Robert Forrester merchant in Glasgow, January* 26. 1808.

The son of a "Recruit," who has served "honestly and faithfully for the "space of four months, but being unfit "for service is rejected," is entitled to the benefit of the act 24th Geo. III. c. 6. No. 38. *Incorporation of Fleshers of Dundee, against Robert Woodcock, February* 24. 1808.

The act of the Town-Council 1785, relative to the buildings in Edinburgh, applies also to those within the new Extended Royalty. No. 42. *John Reid, John Burnet, and others, against John and Andrew Neill, May* 24. 1808.

A person not a member of the corporation of bakers in a royal burgh, who has a bakehouse without the burgh, may send bread into the burgh to persons commissioning it from him, and that though they be retailers of bread within the burgh. No. 51. *Bakers of Haddington against John Smith, June* 10. 1808.

A society formed by a very large number of the inhabitants of a royal burgh, for the purpose of establishing a bakehouse out of the burgh, and supplying themselves and their own families with bread, is not contrary to the privileges of the corporation of bakers in that Burgh. No. 66. *Bakers of Perth against John Gloag, James Stewart, and others, July* 5. 1808.

C

CLAUSE. Circumstances in which the non-acceptance of a *sine qua non*, did not render ineffectual the nomination of executors. No. 27. *William Forbes Esq. of Callender, against the trustees of the Earl of Galloway, February* 2. 1808.

COMPETITION. If a creditor use an inhibition against his debtor, and if, after the inhibition, but before any diligence used by any other creditor to affect it, an heritable subject belonging to his debtor be sold by voluntary sale, then the inhibiting creditor will have a preferable claim upon the price of that subject, in virtue of his inhibition. No. 7. *Jean Maclure and others, against William Baird, November* 19. 1807.

CONFIRMATION. 1*st*, Arrestment used in the hands of the nearest of kin, before confirmation, is inept.

2*d*, In a competition between an arrestment in the hands of the nearest in kin, partially confirmed, and a confirmation as executor-creditor, *ad omissa*, the former attaches no more than the fund specially confirmed; and the latter is the only valid diligence by which the remainder can be attached. No. 23. *Aitkinson, Mure, and Bogle, against Learmonth and Lindsay, January* 14. 1808.

CONTRACT. An author agreed with a bookseller for the publication of a work of science, the price according to a certain rate per sheet, payable by instalments, as the work was published. After the publication of one volume, constituting in itself a complete part, the progress of the work was interrupted by the death of the author. His representatives are entitled to the price of the finished portion, according to the stipulated rate. No. 45. *Archibald Constable and Co. against the Trustees of Professor John Robison, June* 1. 1808.

D

DEATH-BED. A disposition having been executed on death-bed, and the heir having died in minority, reduction at the instance of the next heir was sustained. No. 48. *William Irving against Crawford Tait, Esq. W. S. and others, June* 3. 1808.

DELIVERY. Money being inclosed in a letter, which was wafered, addressed to a certain person, and committed to a servant to be given to a runner to the post-office, the person to whom the letter is addressed, was held to have an exclusive right to receive this money in a competition with a trustee (not judicial) for the creditors of the sender, though the sender died while the letter was still lying in his house, and though it was opened, and the money retained, and delivered to the trustee, by a person who took charge (but without authority) of the deceased's effects. No. 6. *William and John Crawford, against William Kerr, November* 18. 1807.

INDEX.

E

EXCLUSIVE PRIVILEGE. A coachmaker may make iron work for carriages within burgh, though not a member of the Incorporation of Hammermen. No. 16. *Hammermen of Canongate against John Carfrae coachmaker in Canongate, December* 11. 1808.

A person not free of the tailor craft, may sell, in a shop within burgh, clothes made by freemen tailors, and may take commission to get clothes so made. No. 26. *Alexander Craig, deacon, and John Armour, sen collector of the Corporation of Tailors in Glasgow, against Robert Forrester merchant in Glasgow, January* 26. 1808.

A person not a member of the Corporation of Bakers in a royal burgh, who has a bakehouse without the burgh, may send bread into the burgh to persons commissioning it from him, and that though they be retailers of bread within the burgh. No. 51. *Bakers of Haddington against John Smith, June* 10. 1808.

A society formed by a large number of the inhabitants of a royal burgh, for the purpose of establishing a bake-house out of the burgh, and supplying themselves and their own families with bread, is not contrary to the privileges of the Corporation of Bakers in that burgh. No. 66. *Bakers of Perth against John Gloag, James Stewart, and others, July* 5. 1808.

EXPENCE OF PROCESS. In a process the pursuer and defender are conjunctly and severally liable to the clerks of Session for the dues of extract, although the proceedings have not been extended to a decree. No. 29. *Messrs John Pringle, &c. Principal Clerks of Session, against David Black and others, heritors, and the Rev. Mr Spence and the kirk-session of the parish of Orwell, February* 6. 1808.

In a process, the pursuer and defender are conjunctly and severally liable to the clerks of Session for the fees of extract, although the process may have been removed out of Court by extrajudicial transaction. No. 30. *John Pringle, &c. Principal Clerks of Session, against Mrs Rose Innes, &c. and John Gordon, February* 6. 1808.

F

FIAR AND LIFERENTER. An heritable subject being disponed to a grandfather in liferent, and, on his death, to his daughter in liferent, and to her children by a certain marriage in fee, with an express reservation in favour of the grandfather of power to alter the destination and dispose of the subject, and no such reservation in favour of the mother, yet, on his death, the fee is her, not in the children. No. 14. *Children and Grandchildren of David Lindsay, against Robert Dott, December* 9. 1807.

FEES of COURT. In a process the pursuer and defender are conjunctly and severally liable to the Clerks of Session for the dues of extract, although the proceedings have not been extended to a decree. No. 29. *Messrs John Pringle, &c. Principal Clerks of Session, against David Black and others, heritors, and the Rev. Mr Spence and the Kirk Session of the parish of Orwell, February* 6. 1808.

H

HERITABLE and MOVEABLE. If books and furniture, though rendered heritable destination, transmit from the dead to the living without service by possession. No. 44. *Henry Veitch against David Young, May* 25. 1808.

HUSBAND and WIFE. Moveables falling to a wife during her husband's lifetime by the death of her father, but not being vested in her by confirmation till after her husband's death, yet are affected by the *jus mariti*, and shall be shared by the representatives of her husband. No. 21. *Lady Pulteney against Miss Christian Ann Stewart and her guardians, December* 18. 1807.

An interim separate allowance will not be given by the Court to a wife who has only commenced an action of separation. No. 36. *Isabella Maxwell against Alexander Wallace, March* 5. 1808.

I

IMPLIED CONDITION. A person bound by thirlage to grind malt at a certain mill, and to give for the grinding a certain proportion of malt grinded, has a right to repayment from the person receiving this multure of the duties paid to government on the malting of that proportion—the duties being imposed subsequent to the constitution of the thirlage. No. 39. *Magistrates of Forfar and Alexander Malcolm against William Potter, May* 17. 1808.

INFEFTMENT. A disposition and infeftment "to A. B. and the other partners "of a Company," found to be a valid investiture to A. B. No. 31. *Denniston, Macnayr, & Co. against Duncan Macfarlane, February* 16. 1808.

Infeftment prior to the period of 40 days before the term of Whitsunday, and prior to the calling of the summons of

of removing in Court, but posterior to the date and execution of the summons, sustained as a sufficient title in an action of removing. No. 35. *James Campbell against Donald Mackellar and others, March* 2. 1808.

INHIBITION. An inhibition executed and published at the market-cross of the head burgh where the person inhibited resides, is effectual against foreigners. No. 25. *Topham, Davies, and Misses Jarrats, and John White their mandatory, against Thomas Hay Marshall, January* 26. 1808.

INSURANCE. The bankruptcy of the insurer, while the risk is undetermined, does not give the insured a right to retain the premium, or employ it in making a second insurance. No. 52. *Cha. Selkrig, trustee on the sequestrated estate of Hay Smith, against Pitcairn & Scott and others, insurance brokers, June* 14. 1808.

JURISDICTION, JUSTICE OF PEACE. A full record is not required by law in a Justice of Peace Court. No. 1. *John Broadford against James Mitchell Nicolson, Collector of Excise, November* 14. 1807.

By act 39th Geo. III. ch. 66, it is declared that no judgment or conviction pronounced by the Justices under it shall be removable by *certiorari* into any Court whatsoever. An advocation to the Court of Session is nevertheless competent. No. 15. *Mathew Guthrie and others against Henry Cowan, December* 10. 1807.

An action of scandal may competently originate before the Sheriff. No. 17. *Michael Forrest against David Crichton, December* 12. 1807.

An action of declarator of immunity from taxes imposed by British statutes is not competent in the Court of Session. No. 20. *Duke of Queensberry and Lord Hopeton against Officers of State, Dec.* 15. 1807.

L

LETTER OF CREDIT. A person who gives credit on an unlimited letter of credit, without notification to the granter of the letter, does not lose his right of recourse on the granter from want of notification. No. 46. *Robert Ewing acting partner of the Lanark Twist Co. against Adam Wright, June* 2. 1809.

M

MOVEABLES. Money being inclosed in a letter, which was wafered, addressed to a certain person, and committed to a servant to be given to a runner to the post-office; the person to whom the letter is addressed was held to have an exclusive right to receive this money in a competition with a trustee (not judicial) for the creditors of the sender, though the sender died while the letter was still lying in his house, and though it was opened and the money retained, and delivered to the trustee by a person who took charge (but without authority) of the deceased's effects. No. 6. *William and John Crawford against William Kerr, November* 18. 1807.

N

NUISANCE. Iron manufactory within burgh a nuisance. No. 19. *William Thomson, petitioner, December*, 15. 1807.

A glue work, although in a district of the burgh which had been occupied and frequented for time immemorial by various kinds of nauseous manufactories, was so far declared to be a nuisance, that it could not be placed nearer the dwelling-houses and streets than it had formerly been. No. 65. *Mrs Charity and others against William Riddell, July* 5. 1808.

P

PERSONAL OR REAL. Of two conterminous proprietors, one built a mutual gable, and the other became bankrupt without paying for his proportion of it. The former was found to have a preferable claim to the expence of the gable upon the price of the property adjoining, and forming a part of the bankrupt's estate. No. 57. *William Wallace against John Osburn Brown, W. S. Trustee for the creditors of Robert Smith builder in Edinburgh, June* 21. 1808.

Circumstances in which a reservation in a disposition entering the sasine, and making part of the investiture, did not constitute a real burden on the lands. No. 58. *William Martin against Janet Paterson, June* 22. 1808.

POLICE. The act of the Town Council 1785, relative to the buildings in Edinburgh, applies also to those within the new extended royalty. No. 42. *John Reid, John Burnet, and others, against John and Andrew Neil, May* 24. 1808.

POSSESSION. If books and furniture, though rendered heritable destination, transmit from the dead to the living without service by possession. No. 44. *Henry Veitch against David Young, May* 25. 1808.

PRESCRIPTION NEGATIVE, May take place against a general accounting for tailzied funds, though saved as to particular articles. No. 34. *Sir Alexander Kinloch against James Rocheid, March* 1. 1808.

INDEX.

PRESCRIPTION. Successive heirs in whom co-existed the character both of heir of line and institute, and heir of entail, having possessed for more than 40 years, without making up a feudal title in any of these characters,—the entail was not extinguished by the negative prescription. No. 56. *Alex. Welsh Maxwell against Jean Welsh Maxwell, June* 21. 1808.

Under the act 1695, c. 5. an acceptor of a bill "as security jointly and severally," has not the benefit of the act 1695, c. 5. No. 61. *John Sharp against Margaret Hervey and others, June* 24. 1808.

The statute 31 Eliz. c. 5. introducing a general limitation of penal statutes, applies to Scotland in questions under the 12 Queen Anne, § 16. respecting usury. No. 62. *James Morrison against James Connell, June* 24. 1808.

PROOF. *Semiplena probatio*, that a man is father of bastard child—What? No. 2. *Janet Wightman against John Tomlinson, November* 17. 1807.

Confirmation necessary to establish a right to the dead's part in the nearest in kin. Parole proof of the date of lodging bond of caution and inventory with the commissary clerk, incompetent. No. 60. *Robert Blackadder and others against John Blackadder and others, June* 23 1808.

PROCESS. Part of a decree giving expences to a pursuer may be carried to execution by him, while the rest of the decree is under appeal at his instance. No. 12. *Adam Grieve against Lieutenant-Colonel Cunningham, November* 28. 1807.

A summary complaint in the Court of Session by a Sheriff, for a contempt of his authority, is competent. No. 67. *Simon Fraser, Esq; Sheriff of Inverness-shire, against Hugh Robert Duff, Esq; July* 6. 1808.

PROPERTY. The proprietors of a small garden in a town found entitled to erect a screen of wood on their own ground close upon the windows of an adjoining proprietor's house, which looked into their garden, for the purpose of excluding these windows from this view, there being no servitude, *luminibus non officiendi*, and the windows being two of them newly made, the third newly enlarged. No. 37. *Misses Glassford against Joseph Astley, May* 12. 1808.

PUBLIC ROUP. Circumstances which constitute an irregularity in the manner of conducting a public roup. No. 10. *Thomas Burns petitioner, November* 27. 1807.

PUBLIC POLICE. Apprentices to artificers in a town are liable in the performance of statute labour upon the high roads. No. 11. *John Mackay, Alexander Munro, and others, against the Justices of Peace of the county of Ross, November* 27. 1807.

A glue-work although in a district of the burgh which had been occupied and frequented for time immemorial by various kinds of nauseous manufactures, was so far declared to be a nuisance that it could not be placed nearer the dwelling-houses and streets than it had formerly been. No. 65. *Mrs Charity and others against William Riddell, July* 5. 1808.

Iron manufactory within burgh a nuisance. No. 19. *William Thomson petitioner, December* 15. 1807.

R

REPARATION. Publication not necessary to warrant an action of damages for injurious and defamatory expressions in a letter. No. 40. *Dr Alexander Hutchison against John Naismith, May* 18. 1808.

RES JUDICATA. 1st, Circumstances in which a decree of absolvitor did not authorise an exception of *res judicata*. 2d, Lease for 99 years was reduced under a prohibition in an entail against alienations. No. 5. *Sir John Malcolm of Balbedie against George Henderson and Patrick Brown, November* 17. 1807.

RETENTION. Creditors who had received from their debtor a vendition *ex facie* absolute, but had at the same time granted a separate missive, obliging themselves to reconvey on payment of a certain debt, were found entitled to the right in security of *another* debt afterwards contracted. No. 49. *William Balleny trustee on the estate of George Robb, against Henry Raeburn & Co. June* 7. 1808.

S

SALE. Delay in notifying the rejection of goods sent on commission, and using part of them, will take away the right of rejecting them, though the quality be bad. No. 69. *Thomas Stevenson against James Dalrymple, June* 28. 1808.

The disease called the Running-thrush affecting the feet of a horse, constitutes unsoundness. No. 69. *James Ralston against Robert Robb, July* 9. 1808.

SCHOOLS. Act 43d Geo. III. ch. 54. anent schoolmasters salaries. By 2d and 5th sections of this act, it is declared, that within three months the heritors shall meet to accomplish its purposes; and within three months from the time when such meeting is or ought to have been held, the dissatisfied party may appeal to

the quarter sessions. These periods having elapsed, it was nevertheless found competent to call a meeting of the heritors. No. 68. *Andrew Miller schoolmaster in the parish of Cambuslang against William Jackson, July* 9. 1808.

SERVICE. Decision that a general service as heir of line and heir male is equivalent to a service as heir of provision, where it appears from the service that the party serving had both characters in him—reversed. No. 9. *Sir Andrew Cathcart's trustee against Earl of Cassillis, November* 24. 1808.

SERVICE and CONFIRMATION. If books and furniture, though rendered heritable destination, transmit from the dead to the living without service by possession. No. 44. *Henry Veitch against David Young, May* 25. 1808.

An heir of entail having succeeded as next of kin to a creditor upon the entailed estate, the debts do not vest in him without confirmation. No. 59. *Major James Mudie of Milsetter against Robert Russel and others, June* 23. 1808.

Confirmation necessary to establish a right to the dead's part in the nearest in kin. Parole proof of the date of lodging bond of caution and inventary with the commissary clerk incompetent. No. 60. *Robert Blackadder and others against John Blackadder and others, June* 23. 1808.

SOCIETY. The heir of A, a partner of a Company, and an *obligee* in a bond of cash-credit for sums to be drawn by B, another partner of that Co in name of the Co. is bound for sums drawn by B in that name, after the Company has been dissolved by the death of A, no notice of that event having been given to the bank granting the credit. No. 64. *James and David Paterson against David Calder and his curator ad litem, July* 5. 1808.

SOLIDUM ET PRO RATA.—CLAUSE. Circumstances in which the non-acceptance of a *sine qua non* did not render ineffectual the nominatio of executors. No. 27. *William Forbes, Esq; of Callender against the trustees of the Earl of Galloway, February* 2. 1808

STIPEND. Stipends of ministers may be augmented by the present Court of Teinds, though augmented by it before. No. 28. *Minister of Prestonkirk and the Procurator for the Church of Scotland against the Earl of Wemyss, February* 3. 1808.

Interest is due on arrears of ministers augmented stipends from the date of the process of augmentation, to that of the decree of locality, without any charge upon the former decree, or even demand of payment during that time. No. 53. *Robert Dawson against Sir James Pringle, June* 15. 1808

SUPERIOR and VASSAL. A singular successor of the vassal, in a feu on payment of one year's rent to the superior, (a royal burgh,) has a right to demand a charter to himself and heirs whatsoever, tho' the charter of his author was to heirs male, burgesses of that burgh, with a clause in the reddendo, that they should perform burgh services, and that the fee should not devolve on the feminine sex. No. 54 *Magistrates of Aberdeen against John Burnet of Countesswells, June* 17. 1808.

T

TACK.—I. A purchaser of a tack for nineteen times nineteen years from the tenant cannot demand production of the landlord's title.—II. A tack may be validly granted to a company *socio nomine*. III. A disposition and infeftment "to A. "B. and the other partners of a com-"pany," found to be a valid investiture to A. B.—No. 31. *Denniston, Macnair, & Co. against Duncan Macfarlane, February* 16. 1808.

1*st*, An outgoing tenant being bound to consume the whole fodder on the lands, and lay the whole dung thereon the last year of his tack, having withheld part of it from the lands at the last crop, is obliged, without payment, to leave to the incoming tenant the quantity so withheld. And, 2*dly*, To that part of the dung made after the bear seed time, the incoming tenant has a preferable right, on payment of the value.—No. 32. *John Forrester against James Wright, February* 16. 1808.

The tenant of a mill and lands cannot, without consent of his landlord, establish thereon a manufactory or machinery foreign to the purposes of his lease.—No. 41. *Ford against Hillocks, May* 20. 1808.

TAILZIE.—It was provided, that it should not be lawful to the heirs of entail to "sell, alienate, wadset, or dispone the "lands, &c." and afterwards that, "not-"withstanding the irritant and resolutive "clauses," it shall be lawful "to the heirs "of tailzie to set tacks of the said lands "and estate during their own lifetime, "or of the lifetime of the receivers "thereof, the same being always set "without evident diminution of the ren-"tal." Under these clauses, a lease for ninety-seven years, and for which a grassum was paid, although without diminution of the rental, was found to be unlawful.—No. 3. *William Duke of Queensberry*

berry against Francis Earl of Wemyss, and others, November 17. 1807.

1*st*, A lease for a thousand years was reduced, under a prohibition to alienate. 2*d*, The contravener, granter of the lease, being dead, an action of reduction at the joint instance of the son of the contravener and the next substitute, was competent, although by the entail the contravener was to forfeit for himself and his descendants.—No 4. *Keith Turner of Turnerhall, and Andrew Turner against Robert Turner and James Watson, November* 17. 1807.

1*st*, Circumstances in which a decree of absolvitor did not authorise an exemption of *res judicata*. 2*d*, Lease for 99 years was reduced, under a prohibition in an entail against alienation.—No. 5. *Sir John Malcolm of Balbedie, against George Henderson and Patrick Brown, Nov.* 17. 1807.

Under a clause, " Reserving always " liberty and privilege to our said aires " of tailzie to grant feus, tacks, and ren- " tals of sick parts and portions of the " said estate and living as they sall think " fitting, providing the samen be not " made and granted in hurt and diminu- " tion of ther rental," the heir found not entitled, by one gratuitous act, to feu out the whole estate for the purpose of altering the order of succession.—No. 22. *Sir James Norcliff Innes, and Brigadier General Walter Ker of Littledean, and Richard Hotchkis writer to the signet, his attorney, against John Ballenden Ker, Esq. January* 12. 1808.

An alledged heir may, for the purpose of making up a title, grant a bond to trustees, and on that bond they may charge him to enter, adjudge the estate, and convey the adjudication to him, though he be heir of a strict entail.—No. 24. *Robert Craigie and James Horne, trustees of Sir James Norcliff Innes Ker, against Sir James Norcliff Innes Ker, and against General Walter Ker, and John Ballenden Ker, January* 19. 1808.

Clause ineffectual to prevent an alteration in the course of succession.—No. 43. *Robert Brown and others against the Countess of Dalhousie, May* 25. 1808.

THIRLAGE. A person bound by thirlage to grind malt at a certain mill, and to give for the grinding a certain proportion of the malt grinded, has a right to repayment from the person receiving this multure of the duties paid to government on the malting of that proportion,—the duties being imposed subsequent to the constitution of the thirlage. No. 39. *Magistrates of Forfar and Alex. Malcolm against William Potter, May* 17. 1808.

TITLE TO PURSUE. 1*st*, A lease for a thousand years was reduced under a prohibition to alienate. 2*d*, The contravener, granter of the lease, being dead, an action of reduction at the joint instance of the son of the contravener and the next substitute, was competent, although, by the entail, the contravener was to forfeit for himself and his descendants. No. 4. *Keith Turner of Turnerhall and Andrew Turner against Rob. Turner and James Watson, November* 17. 1807.

U

USURY. The statute 31st Eliz. c. 5. introducing a general limitation of penal statutes, applies to Scotland in questions under the 12th Queen Anne, c. 11. § 16. respecting usury. No. 62. *James Morison against James Connel, June* 24. 1808.

W

WARRANDICE. The disease called the running-thrush, affecting the feet of a horse, constitutes unsoundness. No. 69. *James Ralston against Robert Robb, July* 9. 1808.

WRIT. Proof by the testimony of the instrumentary witness to a deed, that they did not see the granter subscribe, nor hear him acknowledge his subscription, is competent to be allowed before answer. No. 18. *Peter and Catharine Swany against Bank of Scotland, Dec.* 12. 1807.

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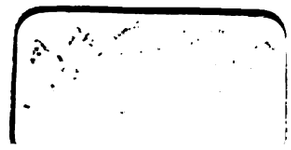
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